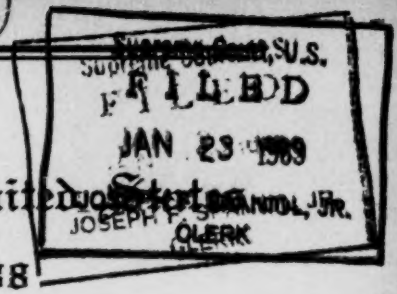
No. 88-1014



In The

Supreme Court of the United States

October Term, 1988

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has jurisdiction to entertain an action by a rail union seeking to enjoin implementation of an arbitration award to which the union is a party rendered pursuant to labor protective conditions imposed under the Interstate Commerce Act when such award is initially reviewable by the Interstate Commerce Commission and thereafter is judicially reviewable exclusively in the Court of Appeals.

LIST OF PARTIES

The names of all parties to the proceeding are contained in the caption.

CSX Transportation, Inc. (hereinafter "CSXT") is a wholly-owned subsidiary of its parent company, CSX Corporation (hereinafter "CSX").

The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are as follows:

The Akron Union Passenger Railroad Company;

Allegheny and Western Railway Company;

Augusta and Summerville Railroad Company;

The Baltimore and Cumberland Valley RailRoad Extension Company;

The Baltimore and Philadelphia Railroad Company;

Beaver Street Tower Company;

Central Transfer Railway and Storage Company;

Chatham Terminal Company;

Clearfield and Mahoning Railway Company;

The Cleveland Terminal & Valley Railroad Company;

CSX Services, Inc.;

Dayton and Michigan Railroad Company;

Dayton and Union Railroad Company;

The Home Avenue Railroad Company;

The Lakefront Dock and Railroad Terminal Company;

North Charleston Terminal Company;

Richmond-Washington Company, which has a subsidiary, RF&P Corporation;

Winston-Salem Southbound Railway Company; and

Woodstock & Blockton Railway Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 10

THIS CASE DOES NOT PRESENT ANY ISSUES APPROPRIATE FOR REVIEW BY THIS COURT 10

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: *Page(s)*

Augspurger v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975) 12

Brotherhood of Locomotive Engineers v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) 12, 19

Brotherhood of Locomotive Engineers v. *Chicago & N.W. Ry*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) 17, 19

Brotherhood of Railway Carmen v. *Interstate Commerce Commission*, No. 88-1724 (D.C. Cir.) . . . 10, 15

Brotherhood of Railway Clerks v. *Florida East Coast Ry*, 384 U.S. 238 (1966) 18

Burlington Northern, Inc. v. *American Railway Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) 19

Burlington Northern R.R. Co. v. *Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987) . . . 18

Burlington Northern R.R. Co. v. *United Transportation Union*, 218 F.2d 856 (8th Cir. 1988), *cert. denied sub nom. Interstate Commerce Commission v. United Transportation Union*, 57 U.S.L.W. 3376 (Nov. 17, 1988) 20

Carey v. *O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) 12

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) 11

Detroit & Toledo Shore Line R.R. v. *United Transportation Union*, 396 U.S. 142 (1969) 18

Page(s)

Federal Communications Commission v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984) 11

International Brotherhood of Electrical Workers v. *Interstate Commerce Commission*, 129 L.R.R.M. 3017 (D.C. Cir. 1988) 14

Interstate Commerce Commission v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 17, 19

Kesinger v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) 12

Lambert Run Coal Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922) 12

McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944) 16, 17

Missouri Pacific R.R. Co. v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987) 19

Nemitz v. *Norfolk & Western Ry Co.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971) 19

Oling v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965) 12

Railway Labor Executives' Ass'n v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3376 (Nov. 28, 1988) 19, 20

Railway Labor Executives' Ass'n v. *United States*, 339 U.S. 142 (1950) 19

Schwabacher v. *United States*, 344 U.S. 182 (1948) ... 16

Page(s)

Seaboard Air Line R.R. Co. v. *Daniel*, 333 U.S. 118 (1948) 16

Texas & N.O.R.R. Co. v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963) 17

United Transportation Union v. *Norfolk & Western Ry Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 98 L. Ed. 2d 651 (1988) 12, 16

Venner v. *Michigan Central R.R. Co.*, 271 U.S. 127 (1926) 11, 12

Whitney National Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 11

Interstate Commerce Commission Decisions:

Chicago and North Western Transportation Co.-- Abandonment--Near Dubuque and Oelwein, Ia., 3 I.C.C. 2d 729 (1987), *aff'd. sub nom. International Brotherhood of Electrical Workers* v. *Interstate Commerce Commission*, 129 L.R.R.M. 3017 (D.C. Cir. 1988) 14

CSX Corportion--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980) . . . . . *Passim*

Denver and Rio Grande Western R.R. Co.--Trackage Rights--Missouri Pacific R.R. Co.--Between Pueblo, CO and Kansas City, MO, I.C.C. Finance Docket No. 30,000 (Sub-No. 18) (served Oct. 25, 1983) 18

Page(s)

Maine Central R.R. Co., et al.--Exemption from 49 U.S.C. 11342 and 11343, I.C.C. Finance Docket No. 30532 (served Sept. 13, 1985), *aff'd. sub. nom. Railway Labor Executives' Ass'n* v. *Interstate Commerce Commission*, 812 F.2d 1443 (D.C. Cir. 1987) 19

New York Dock Ry--Control--Brooklyn Eastern Dist. Term., 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979) 3

Statutes:

28 U.S.C. §1331 8

28 U.S.C. §1337(a) 8

28 U.S.C. §2321(a) 2, 10, 15, 18

28 U.S.C. §2342(5) 2, 10, 15, 18

45 U.S.C. §152 8

45 U.S.C. §156 8

49 U.S.C. §11341(a) . . . . . *Passim*

49 U.S.C. §11343 . . . . . 2, 3

49 U.S.C. §11347 . . . . . 2, 3

No. 88-1014

In The
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BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,
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v.

CSX TRANSPORTATION, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The September 19, 1988, opinion of the Court of Appeals is reported at 855 F.2d 745 and appears in the

appendix to the petition ("Pet. App.") at page 1a. The June 16, 1987, order of the United States District Court for the Southern District of Georgia is reported at 662 F. Supp. 1409 and appears at Pet. App. 11a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1988. Pet. App. 47a. The petition for a writ of certiorari was filed on December 19, 1988. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions pertinent to this case are 49 U.S.C. §§11343 and 11347, and 28 U.S.C. §§2321(a) and 2342(5). The sections from Title 49 are set forth at Pet. App. 49a-52a.

28 U.S.C. § 2321(a) provides:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

28 U.S.C. § 2342(5) provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-
>
> * * *
>
> (5) all rules, regulations, or final orders made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11091(j)(2) of title 49, United States Code.

STATEMENT OF THE CASE

In early 1979, the Chessie System, Inc. ("Chessie"), Seaboard Coast Line Industries, Inc. ("SCLI"), and CSX Corporation, a newly formed holding company, petitioned the Interstate Commerce Commission ("ICC") pursuant to Section 11343 of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11343, for authorization for CSX Corporation to control the rail subsidiaries of Chessie and SCLI through the merger of Chessie and SCLI into CSX in order to create a single, consolidated rail system. The Chesapeake and Ohio Railway Company ("C&O") was one of the rail subsidiaries of Chessie; the Seaboard Coast Line Railroad Company ("SCL"), subsequently renamed CSX Transportation, Inc. ("CSXT"), was one of the rail subsidiaries of SCLI.

The ICC found the creation of this consolidated system to be consistent with the public interest and approved the petition.[1] Pursuant to 49 U.S.C. § 11347, the ICC, as a condition of its approval, imposed its *New York Dock* labor protective conditions.[2] Those conditions provide income protection to employees affected by the creation of this consolidated rail system and, second, provide a procedure culminating in mandatory arbitration for selecting employees and resolving labor disputes resulting from operational

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[1] *CSX Corporation -- Control -- Chessie System, Inc., and Seaboard Coast Line Industries, Inc. ("CSX--Control")*, 363 I.C.C. 521 (1980).

[2] These so-called *New York Dock* Conditions had been developed by the Commission in an earlier control proceeding involving the New York Dock Railway Co. *See New York Dock Ry--Control-Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F. 2d 83 (2d Cir. 1979). Under the *New York Dock* Conditions employees affected by an ICC-approved transaction are entitled to receive up to six years' protection against a resulting loss of income. The *New York Dock* Conditions are set forth in Respondent's Appendix ("CSXT App.") at A-1.

changes by the carriers pursuant to the Commission's consolidation authorization. 363 I.C.C. at 589.[3]

In their short-term operating plan presented to the Commission as part of the application for control authority, the applicants proposed certain operating coordinations and facility consolidations that they planned to implement immediately after receiving the Commission's authority to create the single, consolidated rail system. The consolidation of the CSXT Waycross, Georgia, freight car heavy repair shop and the C&O Raceland, Kentucky, shop was not specifically mentioned. Nonetheless, representatives of rail labor recognized that Commission approval of the control application would allow the carriers to engage in future consolidating activities beyond those specifically contemplated at the time of the original ICC proceedings. Accordingly, those representatives argued to the ICC that such a prospective, long-term impact on rail employees required labor protection more generous than that contained in the *New York Dock* Conditions. 363 I.C.C. at 589.

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[3] Article I, Section 4 of the *New York Dock* Conditions provides an expedited collective bargaining/arbitration mechanism for resolving labor disputes that arise when a carrier, pursuant to the ICC's consolidation authorization, undertakes restructuring actions that may result in the dismissal or displacement of employees. Under Section 4(a), the carrier must give the employees and their unions at least 90 days written notice of the intended transaction. The parties are to begin negotiations within ten days thereafter in an attempt to reach agreement on how the action will be carried out and how the affected employees' interests will be protected. If the parties are unable to reach agreement after bargaining for 30 days, either party may submit the dispute for a binding determination by a neutral arbitrator. Under Section 4(b), the carrier cannot implement the proposed changes until after the parties reach an agreement as a result of their negotiations or the arbitrator's decision resolving the dispute has been rendered. CSXT App. A-3

The Commission agreed that its approval of the control application would empower the CSX system to engage in future facility coordinations and consolidations beyond those then identified. "It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." *Ibid.* However, the Commission ruled that its standard *New York Dock* Conditions would adequately protect any employees who might be affected by such future consolidations. "We believe that the standard conditions will adequately protect those employees now identified as affected by the consolidation *as well as those who may be affected in the future*, but are not now identified specifically." *Ibid.* (emphasis added).

On August 29, 1986, as required by the *New York Dock* Conditions, CSXT and C&O served notice upon the Brotherhood of Railway Carmen ("BRC") and its affected members that, as part of the continued consolidation of the operations of the CSX system following *CSX--Control*, the CSXT freight car heavy repair shop in Waycross, Georgia, would be shut down on or about December 31, 1986, and this work would be transferred to the C&O freight car heavy repair shop at Raceland, Kentucky, for consolidation with the work performed there under the C&O/BRC collective bargaining agreement in effect at that location. CSXT and C&O requested the commencement of negotiations with BRC for the purpose of reaching an implementing agreement to carry out the proposed consolidation, as provided in the *New York Dock* Conditions.

No agreement could be reached with BRC in subsequent bargaining sessions. On October 10, 1986, BRC served a notice under the *New York Dock* Conditions, as well as the arbitration clause of the Orange Book Agreement, an existing labor protection agreement,[4] requesting arbitration of several issues,

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[4] This so-called Orange Book Agreement, so named because of

(Footnote continued on the following page)

including whether Waycross carmen covered by the Orange Book Agreement could be required to transfer to Raceland, and whether the carriers could move work covered under the SCL-BRC collective bargaining agreement and place it under the C&O-BRC agreement. CSXT also invoked arbitration under the *New York Dock* Conditions to resolve the dispute over the implementation of the consolidation. The parties subsequently established a three-member arbitration committee and mutually scheduled the arbitration hearing for December 18, 1986.[5]

On December 17, 1986, the day before the scheduled arbitration hearing was to take place, BRC filed the instant lawsuit in the United States District Court for the Southern District of Georgia, purportedly pursuant to the Railway Labor Act ("RLA"), requesting that CSXT be enjoined from applying or enforcing the award that would result from the *New York Dock* arbitration proceedings. CSXT App. A-79, A-90. The arbitration hearing was held as scheduled the next day with BRC's full participation.

On March 23, 1987, the arbitration committee issued its Opinion and Award imposing an implementing agreement to govern the consolidation of the Waycross and Race-

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4 *(Continued from previous page)*
the color of its cover, was entered into effective August 1, 1966,- between various rail unions, including BRC, and two predecessors of SCL in connection with their then pending merger.

[5] Petitioner's description at page 5 of its petition of the events that led up to the arbitration hearing on December 18, 1986, is seriously erroneous and misleading in several respects. It was BRC, not CSXT, that initially demanded arbitration under Article I, Section 4 of the *New York Dock* Conditions, as well as the Orange Book Agreement. See Pet. App. 68A. CSXT and C&O did not insist on arbitration only under *New York Dock*. Indeed, both *New York Dock* and Orange Book issues were fully presented to the arbitration committee, which expressly acknowledged in its award that it was serving in both capacities. CSXT App. A-17. Finally, both BRC and the carriers jointly selected the neutral member of the arbitration committee. He was not obtained by CSXT from the National Mediation Board.

land facilities. CSXT App. A-14. The committee rejected BRC's claim that it lacked authority to provide an implementing agreement for the transfer of work or employees because such transfers allegedly would be in derogation of existing collective bargaining agreements, merger protection agreements, and the Railway Labor Act. The committee recognized that it served as a "quasi-judicial extension" of the ICC because its underlying arbitral authority derived from the ICC's order in *CSX--Control* imposing the *New York Dock* Conditions and that, as a result, it should follow the ICC's interpretation of its own power and of its enabling statute, the Interstate Commerce Act. *Id.* at A-41. The committee recognized that the ICC has declared that ICC-authorized transactions are exempt from the requirements of the Railway Labor Act, to the extent the RLA bargaining procedures conflict with the expedited bargaining/arbitration procedure established by the ICC in its *New York Dock* Conditions. *Id.* at A-41 to A-43. Thus, the committee concluded that, as an agent for the ICC, it possessed the requisite authority to formulate an implementing agreement that would provide for the transfer of both work and employees from Waycross to Raceland. *Id.* at A-43.[6]

Following the issuance of the arbitration award, both the carriers and BRC commenced proceedings before the ICC seeking administrative review of the award. On April 13, 1987, CSXT and C&O filed a Petition for Administrative Review with the Commission seeking review of that portion of the award that prevented CSXT from mov-

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[6] The committee interpreted the Orange Book Agreement as not allowing CSXT to transfer either Orange Book-protected *employees* or their *work* beyond the former SCL property. CSXT App. A-43 to A-45. The committee recognized, however, that, as a result of ICA Section 11341(a), the limitation in the Orange Book on the transfer of *work* "must be subordinated to the Carriers' right

(Footnote continued on the following page)

ing Orange Book-protected employees from Waycross to Raceland.

BRC prayed in its Cross-Complaint for Review of Opinion and Award of Arbitration Committee that the Award "should be set aside as exceeding this agency's jurisdiction." In particular, BRC argued to the Commission that the award had improperly superceded the RLA and collective bargaining agreement rights of the union's members because the exemption from "all other law" found in ICA Section 11341(a) does not apply to the RLA or to collective bargaining obligations. In addition, BRC argued that the arbitration committee had no jurisdiction to resolve the bargaining dispute over the shop consolidation because this consolidation had not been expressly referred to in the proceedings before the Commission in *CSX--Control.*

While these arbitration review proceedings were pending before the ICC, the district court, on June 16, 1987, dismissed BRC's complaint. The court ruled that it had jurisdiction over BRC's Railway Labor Act claims under 28 U.S.C. § §1331 and 1337(a) as well as under 45 U.S.C.§§152 First and Seventh and 156 and under 49 U.S.C. § 11341. The court did not expressly address CSXT's argument that BRC's claims constituted an impermissible collateral attack on the ongoing ICC arbitration review proceed-

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6 *(Continued from previous page)*
to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland." *Id.* at A-45. Nevertheless, the committee refused to relieve CSXT from the perceived restrictions in the Orange Book on transferring *employees* off the SCL property because the committee found that this limitation "will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions." *Id.* at A-45. Thus, the committee ruled that CSXT could transfer the work of Orange Book-protected employees but could not compel Orange Book-protected employees themselves to accept Raceland positions. *Id* at A-46.

ings. The court nevertheless ruled that, under ICA Section 11341(a), the proposed Waycross/Raceland shop consolidation was exempted from the application of the RLA and any restraints in the relevant collective bargaining agreements. Pet. App. 21a.

Following the entry of judgment dismissing BRC's complaint, CSXT and C&O implemented the shop consolidation and transferred the freight car heavy repair work and non-Orange Book-protected employees from Waycross to Raceland in accordance with the terms of the Arbitrated Implementing Agreement.[7]

BRC appealed the dismissal of its claims by the district court to the Eleventh Circuit. While the appeal was pending, on June 23, 1988, the ICC served its ruling on the cross-applications filed by the parties with respect to the arbitration award. Pet. App. 23a-46a. The Commission ruled that it had jurisdiction to review the award. Pet. App. 26a. It then upheld the conclusion of the arbitration committee that it had the authority to impose an implementing agreement moving both work and employees to Raceland, despite potentially conflicting provisions of bargaining agreements, the RLA, or the *New York Dock* Conditions themselves. Pet. App. 30a-31a, 35a.[8] BRC's petition seeking review of the Commission's order is now pending before the United States Court of Appeals for the D.C. Circuit, *sub nom. Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, No. 88-1724.

On September 19, 1988, the Eleventh Circuit rejected BRC's appeal in the purported Railway Labor Act action

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[7] The Commission on June 5, 1987, denied BRC's request for an emergency cease and desist order during the pendency of the ICC review proceedings.

[8] The Commission reversed the arbitration award insofar as it had prevented the carriers from transferring Orange Book-protected employees to Raceland, explaining that, "Once it is

(Footnote continued on the following page)

seeking to enjoin implementation of the arbitration award and vacated and remanded the judgment of the district court with orders that BRC's claims be dismissed for lack of subject matter jurisdiction. Pet. App. 1a-10a. The Court of Appeals did not reach the issue of the interplay between the ICA and the RLA, on which the district court had based its ruling, but instead concluded that BRC's lawsuit was, in effect, an impermissible collateral attack on the ICC arbitration proceedings and award, review of which was ultimately committed to the Court of Appeals under 28 U.S.C. §§ 2321(a) and 2342(5). Pet. App. 8a.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY ISSUES APPROPRIATE FOR REVIEW BY THIS COURT

Contrary to Petitioner's assertions, this case does not present issues of importance to the rail industry or the process of administrative law that need to be resolved by this Court. The decision of the Court of Appeals was merely a routine application of the settled principle of administrative law proscribing collateral attacks on administrative agency orders when Congress specifically has assigned the jurisdiction to review such orders to another court, *i.e.*, the Court of Appeals. Nor does the narrow decision of the Court of Appeals below give rise to an issue as to the interplay between the Interstate Commerce Act and Railway Labor Act as urged by Petitioner. The case below was dismissed for lack of jurisdiction, and no resolution of this RLA-ICA issue was reached. That issue is more appropri-

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8 *(Continued from previous page)*
determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction." Pet. App. 36a.

ately decided on the appeal of the arbitration award that Petitioner has commenced and that is currently pending in the D.C. Circuit. Moreover, Petitioner's assertion of confusion in the law concerning the interplay between the ICA and the RLA is only achieved by a broad lumping together of decisions arising under various diverse sections of the ICA and by ignoring statutory distinctions that those very decisions found relevant and controlling. The narrow decision of the court below is consistent with this Court's prior decisions and does not present any issues of national import or the opportunity to resolve a conflict between the circuits.

1. The decision of the Court of Appeals was merely a routine application of the settled principle of administrative law proscribing collateral attacks on administrative agency orders when Congress has assigned jurisdiction to review agency orders to a particular court. That court's jurisdiction is exclusive and forecloses challenges to such orders in a different forum. Petitioner has available to it through its appeal from the arbitration award a full review of all relevant issues. *See, e.g., Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958); *Venner* v. *Michigan Central R.R. Co.*, 271 U.S. 127, 130-31 (1926).

As this Court explained in *City of Tacoma*, an agency's actions cannot be attacked in a court other than the statutory review court even on the ground that its actions violate another federal law. 357 U.S. at 334-37. Thus, where, as here, Congress has designated the Court of Appeals to review an agency's actions, "all objections to the [agency's] order. . .must be made in the Court of Appeals or not at all." 357 U.S. at 336. This principle may not be avoided by bringing a civil suit in the wrong forum under the guise of an action to enjoin a party to the agency proceedings from carrying out the actions approved by the agency. As

this Court recently held in *Federal Communications Commission* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984), "Litigants may not evade this provision [for exclusive Court of Appeals review] by requesting the District Court to enjoin action that is the outcome of the agency's order." *See also Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-82 (1922); *Venner, supra*, 271 U.S. at 130 (Action assailing validity of ICC order and praying that railroad be enjoined from implementing order "is equivalent to asking that the order be adjudged invalid and set aside.").

BRC attempted just such an end run around the statutory review procedures here. In asking the district court to enjoin CSXT from implementing the ICC arbitration award (CSXT App.A-90), BRC was in effect seeking to have the award "adjudged invalid and set aside," in derogation of the exclusive administrative review mechanism established by Congress for ICC orders.

Federal courts have routinely dismissed for lack of jurisdiction collateral attacks on ICC and Civil Aeronautics Board orders brought in the district courts notwithstanding the fact that the plaintiffs have claimed that compliance with such orders would violate the RLA or collective bargaining rights. *See, e.g., Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F. 2d 794, 799-802 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F. 2d 853, 860 (8th Cir. 1975); *Carey* v. *O'Donnell*, 506 F. 2d 107, 110-11 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger* v. *Universal Airlines, Inc.* , 474 F. 2d 1127, 1132 (6th Cir. 1973); *Oling* v. *Air Line Pilots Ass'n*, 346 F. 2d 270, 276-77 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

Most recently, the D.C. Circuit rejected just such a collateral attack, under circumstances nearly identical to those here, in *United Transportation Union* v. *Norfolk & Western Ry Co.*, 822 F. 2d 1114 (D.C. Cir. 1987) ("*UTU*

v. *N&W*"), *cert. denied*, 98 L. Ed.2d 651 (1988). A rail union filed suit against a railroad, seeking to enjoin the carrier from implementing an arbitration award issued by an arbitrator serving under labor protection conditions imposed by the ICC, on the ground that compliance with the award, which transferred employees from one collective bargaining agreement and carrier to another, would violate the RLA. The D.C. Circuit affirmed the dismissal of the union's claims, based on its recognition that, because the arbitrator derived his authority solely from the ICC order imposing labor protection conditions on the railroad, "[t]he Union's challenge to the arbitral award is a challenge to the Commission's authority, through its delegate, to diminish rights said otherwise to be conferred by the RLA." 822 F. 2d at 1120. The D.C. Circuit held:

> The conclusion that the arbitral award, like the exemption award [ICC order] from which it derives, was functionally an "order of the Commission" within the meaning of 28 U.S.C. § 2321(a) is therefore inescapable. Accordingly, the district court lacked subject matter jurisdiction to entertain the challenge. The proper avenue of appeal is prescribed by 28 U.S.C. §§ 2321(a) and 2342(5). . . .

822 F. 2d at 1120.[9] The court rejected the identical RLA-based jurisdictional arguments made by BRC here, explaining:

> The Union's argument for jurisdiction below rests crucially on the proposition that it is asserting violations of the RLA rather than defects in an order of the Commission. For us to agree, however, would enable a party, merely by drafting an artfully worded complaint, to avoid the bar of a clearly applicable jurisdictional statute. The Union's complaint is with the Commission and the

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[9] BRC does not dispute that the arbitration committee here was operating as a delegate of the ICC pursuant to Article I, Section 4(a) of the *New York Dock* Conditions.

> arbitration it set up. Its theory is that neither the Commission nor its arbitrator can lawfully issue an order that derogates the Union's rights under the RLA, not that they have somehow "violated" the RLA. To view the matter otherwise would be to allow the complainant's own description of its theory to determine the forum with jurisdiction.

Ibid.

Similarly here, BRC's complaint is in reality with the ICC's interpretation of the ICA. BRC, in seeking to enjoin CSXT from putting into effect the results of the arbitration and from complying with the implementing agreement prescribed by the arbitration committee, was in essence asking the district court to review and set aside the arbitration award on the ground that the committee had erroneously interpreted the scope of the authority of the ICC and its delegated agents under the Interstate Commerce Act.

As the instant case demonstrates, the ICC will review the decisions of arbitrators appointed under its prescribed labor protection conditions. *See also Chicago and North Western Transportation Co.--Abandonment--Near Dubuque and Oelwein, Ia.*, 3 I.C.C.2d 729 (1987), *aff'd sub nom. International Brotherhood of Electrical Workers* v. *Interstate Commerce Commission ("IBEW* v. *ICC")*, 129 L.R.R.M. 3017 (D.C. Cir. 1988). The appropriateness of ICC review, in the first instance, has recently been confirmed by the D.C. Circuit in *IBEW* v. *ICC*, *supra*.

It is particularly appropriate that issues such as those raised in the district court by BRC here be considered first by the ICC. BRC's claim that the Waycross/Raceland shop consolidation was not "authorized" by, or within the scope of, the Commission's decision in *CSX--Control* is peculiarly within the expertise of the Commission, the decision's author. Similarly, the claim that the arbitration committee lacked the authority to move people and work from one location and bargaining agreement to another is simply an argument that the committee exceeded the authority

delegated to it by the ICC under, and misinterpreted, the ICA. The Commission, with its expertise in interpreting Congress' statutory intent regarding the ICA, should have the first opportunity to correct any such error, subject to subsequent judicial review in the Court of Appeals. Finally, Congress vested exclusive jurisdiction in the Commission to carry out the nation's transportation policy while at the same time determining the level of labor protection necessary to protect the legitimate interests of affected rail employees. When there are claims that this delicate balance has been disturbed, it is the Commission, and not a district court, that should resolve them and decide what relief, if any, is appropriate; judicial review is then available in the Court of Appeals. 28 U.S.C. §§2321(a), 2342(5).

BRC presented all of its RLA-based arguments challenging the legality of the Waycross/Raceland shop consolidation first to the arbitration committee and then to the ICC, and now may present them to the D.C. Circuit.[10] The D.C. Circuit can grant BRC full relief in the event it determines the Commission and its delegate have erred.

The decision of the Eleventh Circuit prohibiting BRC's collateral attack on the established administrative review process was both consistent with this Court's prior decisions and in keeping with Congress' express directive

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[10] BRC has included the following enumerated issues in its brief to the D.C. Circuit in *Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, No. 88-1724, filed on January 5, 1989:

> 1. Whether the ICC's and the arbitration committee's conclusion that the immunity provisions of 49 U.S.C. § 11341(a) applied to and relieved CSXT of its contractual and statutory obligations to employees under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, was in excess of ICC statutory jurisdiction and otherwise not in accordance with law?
> 2. Whether the ICC and the arbitration committee in authorizing or approving the "transaction" violated 49

(Footnote continued on the following page)

granting exclusive jurisdiction to the Court of Appeals to review ICC orders. In *UTU* v. *N&W*, *supra*, this Court just last term denied a rail union's petition for a writ of certiorari that presented essentially the same RLA-based jurisdictional arguments made by BRC here. BRC's petition is no more worthy and should also be denied.

2. Petitioner's suggestion that the Court of Appeals' decision is contrary to the Interstate Commerce Act and prior decisions of this Court and the Court of Appeals is erroneous. As noted at page 12, *supra*, the federal courts have consistently rejected collateral attacks on ongoing ICC proceedings, such as the arbitration proceeding here. Neither *Schwabacher* v. *United States*, 334 U.S. 182 (1948), *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948), nor *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), relied on by BRC, is in any way apposite. *Schwabacher* and *McLean* were actions seeking to enjoin or set aside ICC orders that were properly commenced before a three-judge district court, as then required by Congress. *See* 334 U.S. at 189; 321 U.S. at 68. No issue of jurisdiction arose.[11] *Seaboard* was an action brought in state court

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10 *(Continued from previous page)*

> U.S.C. § 11347 by eliminating "rights, privileges, and benefits . . . [of employees represented by petitioner] under existing collective-bargaining agreements or otherwise" which were required to be preserved by that provision of the Interstate Commerce Act?
>
> 3. Assuming ICC authority to determine to what extent § 11341(a) applied to this case, does the exemption conferred by § 11341(a) from restraining or prohibitory laws apply to actions of a carrier which are not subject to ICC approval under § 11343, or any other provision of the Interstate Commerce Act, and which were not contemplated or brought to the attention of the ICC at the time the control approval order was issued under §§11343(a) and 11344 some six years earlier?

11 This Court in *McLean* did observe, as BRC notes, that Congress did not charge the ICC with the duty or authority to execute laws

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by a rail carrier seeking to enjoin the State of South Carolina from enforcing its corporation laws with respect to an ICC-approved railroad reorganization. This Court had little difficulty in finding that such an action by the beneficiary of an ICC order did not constitute a suit to enjoin, set aside, annul, or suspend the Commission's order; no such relief was sought in the railroad's complaint or the answer. 333 U.S. at 122-23.[12] Thus, none of these cases involved an independent judicial action by a party to an ICC-imposed arbitration proceeding seeking to enjoin another such party from complying with the arbitration award, particularly where the party seeking such relief was simultaneously pursuing review of the award before the ICC and, ultimately, the Court of Appeals.

Nor does the statement in Justice Stevens' concurring opinion in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 96 L. Ed. 2d 222, 247 n.13 (1987), that the "necessity" for the supercession

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11 *(Continued from previous page)*
other than the ICA. 321 U.S. at 79. But, this Court did not rule that, as a result, parties seeking to challenge Commission orders under such other statutes are free to do so in any forum. BRC ignores the fact that in *McLean* this Court explained that, while the policies of these other federal statutes, such as the Sherman Act (or the RLA), are to be considered in varying degrees by the Commission in determining whether the proposed transaction is consistent with the public interest, once that determination has been made, the Commission's order supercedes these other statutes as a result of the predecessor of ICA Section 11341(a). 321 U.S. at 80, 85-88.

12 Similarly, *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry Co.*, 314 F. 2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), and *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), were both district court actions commenced by rail carriers seeking to remove labor obstacles to the implementation of ICC-approved rail transactions, not actions, such as BRC's here, to enjoin the implementation of a Commission order, which can only be brought in the Court of Appeals.

of "other law" provided by ICA Section 11341(a) is to be determined by the "tribunal that is faced with a claim that a party is violating some 'other law,' " condone the collateral attack on the ICC arbitration proceeding mounted by BRC here. Subject matter jurisdiction was never an issue in that case, which arose from a petition for review of an ICC order initially filed in the Court of Appeals under 28 U.S.C. §§2321(a) and 2342(5). The proper tribunal to determine whether the arbitration award here improperly overrode the bargaining agreement or RLA rights of BRC and its members was also initially the Commission and, subsequently, the Court of Appeals, as the Eleventh Circuit properly recognized. Pet. App. 8a.

3. The bulk of BRC's petition is simply an attack on the ICC's determination that the expedited bargaining/arbitration procedure specified in its labor protective conditions supercedes the endless bargaining procedures of the Railway Labor Act[13] and that the ICC or its arbitrator-delegate has authority in imposing implementing agreements to depart from asserted collective bargaining agreement or RLA rights.[14] BRC maintains that rail carriers may not implement transactions authorized by the ICC until they have fully complied with the interminable RLA bargaining process, with the ultimate threat of a strike in the event agreement on the union's terms is not

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[13] This Court has previously recognized that the RLA bargaining process is "purposely long and drawn out," *Brotherhood of Railway Clerks* v. *Florida East Coast Ry*, 384 U.S. 238, 246 (1966), and has described it as "almost an interminable process" and as "virtually endless." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 149 (1969); *Burlington Northern R.R. Co.* v. *Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 95 L.Ed.2d 381, 397 (1987).

[14] *See, e.g., Denver and Rio Grande Western R.R. Co. - Trackage Rights -- Missouri Pacific R.R. Co. -- Between Pueblo, CO and Kansas City, MO*, ICC Finance Docket No. 30,000 (Sub-No. 18)

(Footnote continued on the following page)

reached, even though the carriers are simply implementing the transaction in accordance with the terms of an ICC-required arbitration award. In essence, BRC would have this Court provide rail unions with the same veto power over rail transactions expressly rejected by Congress when it voted down the Harrington Amendment to the Transportation Act of 1940. *See Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry*, 314 F. 2d 424, 430-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).[15]

This case, in which the provisions of ICA Section 11341(a) expressly apply, in which labor protective conditions have been imposed by the ICC, and in which the carrier has simply implemented an arbitration award expressly contemplated by those conditions, should not be confused with the plethora of "short line" sale cases, such as *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F. 2d 420 (3d Cir. 1988), *Trainmencert.*

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14 *(Continued from previous page)*
(served Oct. 25, 1983); *Maine Central R.R. Co., et al. -- Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30532 (served Sept. 13, 1985), *aff'd sub nom. Railway Labor Executives' Ass'n v. Interstate Commerce Commission*, 812 F. 2d 1443 (D.C. Cir. 1987).

15 The federal courts have long recognized that the RLA is among the "other law" superceded when necessary by the ICA as a result of ICA Section 11341(a). See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*, 788 F. 2d at 800-01; *Missouri Pacific R.R. Co.* v. *United Transportation Union*, 782 F. 2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F. 2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry*, *supra*, 314 F. 2d at 430-32; *Nemitz* v. *Norfolk & Western Ry Co.*, 436 F. 2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). *Cf. Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, *supra*, 96 L. Ed. 2d at 244-49 (Stevens, J., concurring).

granted, 57 U.S.L.W. 3376 (Nov. 28, 1988), where the sales transactions at issue were not expressly covered by Section 11341(a)[16] and where the ICC in its discretion declined to impose labor protection conditions. Indeed, Petitioner has not cited a single case in which a federal court has ruled that a rail carrier must comply with the RLA bargaining procedures prior to implementing an ICC-authorized transaction to which Section 11341(a) applies. In contrast, *see Burlington Northern R.R. Co.* v. *United Transportation Union*, 848 F. 2d 856, 863 (8th Cir. 1988), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 57 U.S.L.W. 3376 (Nov. 17, 1988) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§11341(a), or 11347, it effectively supersedes. . .the RLA . . . ").

However, this case is not the proper vehicle to address these issues, which were not even reached by the Court of Appeals below. BRC currently has the opportunity to argue and is presenting these arguments to the D.C. Circuit in its review of the ICC order that itself reviewed the Waycross/Raceland arbitration award. If BRC is not satisfied with the decision that court will ultimately issue, it can, and presumably will, present this Court with a petition seeking review of that decision.

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[16] Indeed, the Third Circuit in *Pittsburgh & Lake Erie* expressly noted that ICA Section 11341(a) was not applicable to the rail transaction involved in that case and, accordingly, it was not required to determine the effect of that section on RLA bargaining obligations. 845 F. 2d at 445-46 & n.45.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX

A. *New York Dock* Conditions, from *New York Dock Ry–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979) A-1

B. Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen-Division of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers*, March 23, 1988 . . . . . A-14

C. Verified Complaint for Declaratory Judgment and Injunctive Relief, *Brotherhood Railway, Airline and Steamship Clerks, et al.* v. *CSX Transportation, Inc.*, No. CV 286-243 (S.D. Ga.), filed December 17, 1986 . . . . . A-79

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. **Definitions**. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and,

provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. **Notice and Agreement or Decision** - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days, Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. **Displacement allowances** - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average

monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement. or dismissal for justifiable cause.

6. **Dismissal allowances**. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transac-

tion. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. **Separation allowance**. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. **Fringe benefits**. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. **Moving expenses**. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction,and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; *provided however*, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is

presented to railroad with 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. **Arbitration of disputes**. - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on

the arbitration committee, in which even the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. **Losses from home removal.** - (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matter, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses

of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which

railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary

to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or other wise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:

BROTHERHOOD RAILWAY CARMEN - A DIVISION OF BRAC,

Organization,

and

CSX TRANSPORTATION, INC. and THE CHESAPEAKE and OHIO RAILWAY COMPANY,

Carriers.

OPINION AND AWARD

Pursuant to Article I, Section 4 of the New York Dock Conditions and Section 4 of the November 3, 1966 Merger Protective Agreement

I.C.C. Finance Docket No. 28905

Hearing Date: December 18, 1986
Hearing Location: Jacksonville, Florida

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carriers' Member: J. T. Williams
Neutral Member: John B. LaRocco

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OPINION OF THE COMMITTEE

I. INTRODUCTION

On September 23, 1980, the Interstate Commerce Commission (ICC) approved CSX Corporation's petition to control two non-carrier holding companies: Chessie System, Inc. and Seaboard Coast Line Industries, Inc. ICC Finance Docket No. 28905 (Sub-No. 1). 363 I.C.C. 521 (1980). The Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company (B&O) are the major railroad subsidiaries of Chessie System, Inc. In 1980, Seaboard Coast Line Industries, Inc. was the parent of the Family Lines which included the Seaboard Coast Line Railroad (SCL). The successor enterprises of the Family Lines were Seaboard System Railroad and currently CSX Transportation, Inc. (CSX). The end to end consolidation produced a large single system serving the northeast, southeast and midwest. *Id.* at 553. The railroad subsidiaries remained separate entities. *Id.* at 575. To compensate and protect employees adversely affected by the control case and related proceedings, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of the involved railroads pursuant to the relevant enabling statute. 49 U.S.C. 11343, 11347; 363 I.C.C. 521, 588.

In 1966, the ICC approved the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). The merged carrier became the SCL.

On November 3, 1966, the Brotherhood Railway Carmen (BRC) and sixteen other rail labor organizations entered into an Agreement with the SAL and ACL for the Protection of Employees in the Event of the SAL-ACL Merger. The Agreement, commonly referred to as the

Orange Book, was effective August 1, 1966. The parties negotiated the Orange Book pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act. In 1978, Congress enacted 49 U.S.C. 11347 and repealed Section 5(2)(f).

II. BACKGROUND AND SUMMARY OF THE FACTS

CSX and C&O (collectively "the Carriers") issued written notice, dated August 29, 1986, of their intent to close CSX's freight car heavy repair shop at Waycross, Georgia and to simultaneously transfer " . . . freight car heavy repair work and certain storeroom work at Waycross . . . " to the C&O's Raceland, Kentucky freight car heavy repair facility. The work moved from Waycros would be " . . . coordinated with such work presently being performed at Raceland under the C&O Agreement." The repair work and Waycross employees are presently subject to the SCL Schedule Agreement. Approximately fifty percent of the employees currently occupying positions at the Waycross repair shop are present employees within the definition set forth in Orange Book Section 2(a).

In their notice, the Carriers informed the Organization of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. The Organization represents 121 of the incumbents holding positions slated for abolition. By class, the incumbents are 99 Carmen, 4 Carman Helpers, 13 Painters and 5 Painter Helpers. At the coordinated Raceland facility, the Carriers estimated that they would create 86 Carmen, 3 Carman Helper, 6 Painter and 4 Painter Helper positions to perform the work transferred from Waycross. Except as described above, the notice was silent concerning the 22 workers whose positions would be abolished but would be unable to either obtain an equivalent, newly established Raceland position or exercise their seniority to claim a remaining position at Waycross. The Carriers anticipated that they would close

the Waycross freight car heavy repair shop on or about December 31, 1986.

The notice also indicated that CSX would abolish 3 clerical positions, 11 jobs in the blacksmith's craft, 6 laborer positions, 3 Machinist positions, 4 jobs held by sheet metal workers and 1 electric crane operator position. At Raceland, the Carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions.

After the Carriers served the August 29, 1986 notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful primarily because irreconcilable disagreements developed over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a New York Dock implementing agreement and the Carriers' right to implement the transaction without first complying with the Railway Labor Act. 45 U.S.C. 151 *et seq.* Thereafter, the Organization, and later the Carriers, invoked arbitration in accord with Section 4(a) of the New York Dock Conditions.[1] Even though Section 4 contemplates arbitration by a single, neutral arbiter, the parties formed this Committee to resolve all outstanding disputes under the New York Dock Conditions and the Orange Book. Thus, we derive dual authority from Section 4 of the New York Dock Conditions and Section 4 of the Orange Book.

Beginning on November 4, 1986, the Organization challenged the jurisdiction of this Committee to fashion an implementing agreement. Despite its prior invocation of arbitration, the Organization may nonetheless contest our fundamental power to adjudicate this dispute. A lack of jurisdiction allegation may be raised at any time.

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[1] All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

Therefore, the Organization is not estopped from urging this Committee to dismiss all the substantive matters which the parties previously agreed to submit to us.

The Organization and the Carriers filed prehearing submissions and extensively argued their respective contentions at the December 18, 1986 hearing. Also, they filed post-hearing briefs which the Neutral Member received on January 2, 1987. This decision was issued within the thirty day limitation period found in Section 4(a)(3) of the New York Dock Conditions.

III. STATEMENT OF THE ISSUES

The Carriers pose the following question to this Committee:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

The "attached agreement" referred to in the Carriers' question at issue is a proposed implementing agreement which it sent to the Organization on October 15, 1986. The Carriers withdrew all their prior proposals.

In its opening submission, the Organization proffered four issues which read:

> **"ISSUE NO. 1:**
>
> "Is the CSX's notice dated August 29, 1986 (attached as Exhibit No. 1), concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL to Raceland, Ky. on the C&O adequate and specific enough notice under the *New York Dock* conditions?
>
> **"ISSUE NO. 2:**
>
> "If this arbitrator has jurisdiction of this dispute, can the affected employees who have lifetime

guaranteed jobs on the SSR under the Orange Book agreement–which gives the SSR the right to transfer work and employees only from their home point to other points on the former SAL-ACL railroads–be compelled to transfer to another point on another railroad which is not on the property of the former SCL and ACL railroads without unilaterally effecting a change in their wages, rules or working conditions as set forth in the Orange Book?

"ISSUE NO. 3:

"Can CSX move the work which is subject to the SCL (SSR) Working Agreement and restricted to the SCL employees, out from under the SCL agreement and place it under another contract (Working Agreement) on another railroad?

"ISSUE NO. 4:

"If the above issues each are answered in the affirmative, what should be the terms of an implementing agreement under Article I, Section 4 of *New York Dock*?"

In addition, the Organization's General Chairman on the C&O raised another issue although the question is actually a subset of the above stated fourth issue. The C&O General Chairman presented the following question:

"Shall the C&O employees, junior in seniority to employees transferring from Waycross, Georgia, corresponding [sic] to the number of senior employees transferring to the coordinated operations, be subject to the protective benefits set forth in Article 5 and 6 of the New York Dock Conditions?"

IV. RELEVANT STATUTES, ORANGE BOOK PROVISIONS, EXCERPTS FROM NEW YORK DOCK CONDITIONS AND RECENT COURT DECISIONS

To fully understand the parties' contentions, we must first relate the relevant statutes, contract provisions and legal authority.

The ICC promulgated and imposed the New York Dock Conditions pursuant to the Congressional mandate in Section 11347 of the Interstate Commerce Act. 49 U.S.C. 11347. Starting with Section 1(a), a transaction is " . . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Section 4(a) states that " . . . any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or [arbitrator's] decision under this section 4." [Brackets added for clarification.] 360 I.C.C. 85. Assuming we have jurisdiction, Section 4 empowers this Committee to write an implementing agreement providing for " . . . the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . " *Id.* Also, Section 4 requires the Carriers contemplating a transaction to issue a notice containing " . . . a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." With regard to its jurisdictional challenge, the Organization relies heavily on Sections 2 and 3 of the New York Dock Conditions. These two sections state:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
>
> "3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective

conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

Section 3 (a) of the Orange Book reads:

"*In consideration of the foregoing employee benefits the Merged Company shall*, subject to compliance with the provisions of Appendix F attached hereto, *be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will*, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, *enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided* and the employees, their organizations and the Carriers will cooperate to that end." [Emphasis added.]

The pertinent portion of Section 11341 (a) of the Interstate Commerce Act provides that a carrier or person participating in an approved transaction " . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction . . . " 49 U.S.C. 11341(a). In *Denver and Rio Grande Western Railroad Co. - Trackage Rights - Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (unreported) ("the *DRGW* Case"), the ICC interpreted the

scope of its Congressionally delegated authority pursuant to Section 11341 (a). The Commission asserted: "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the . . . " Railway Labor Act. *DRGW* at 5. The ICC observed that if its approval of a transaction " . . . did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring a change in working conditions of any employees would be substantially nullified." *DRGW* at 6. The ICC ruled that a duly approved trackage rights agreement containing crew assignments was paramount to conflicting terms in the schedule labor agreements.

The District of Columbia Circuit Court of Appeals reversed the ICC's decision. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985); cert. granted _ U.S. _ (1986). While recognizing that Congress granted the ICC broad powers to exempt transactions from legal obstacles, the Court ruled that the ICC must justify the exercise of its statutory authority. The case is currently pending before the United States Supreme Court.

V. THE POSITIONS OF THE PARTIES

A. The Organization's Position on Jurisdiction

The Organization strenuously argues that we lack jurisdiction to fashion an implementing agreement which changes the rules and working conditions in existing collective bargaining and job security agreements. Section 2 of the New York Dock Conditions bars the Carriers from utilizing the compulsory interest arbitration mechanism in Section 4 to remove either employees or work from the SCL Agreement and place the work or workers under the C&O agreement without exhausting the notice and collec-

tive bargaining requirements in the Railway Labor Act. 45 U.S.C. 151, 156. Neither the ICC nor a Section 4 arbitrator can bind the Organization absent its consent.

The Organization reviewed the history of employee protection in the railroad industry. The historical record evinces a consistently strong public policy favoring employee protection as the consequence of streamlining the national rail transportation network. The Organization emphasizes that the New York Dock Conditions, like all employee protective arrangements, are imposed on carriers for the sole benefit of their workers. If Section 4 of the New York Dock Conditions becomes a subterfuge for inflicting mandatory, binding interest arbitration on employees and their representatives contrary to Sections 6 and 7 of the Railway Labor Act, the employee protection is irrationally twisted into a formidable weapon for, instead of an obligation on, rail carriers. Railroads will routinely resort to Section 4 to unilaterally fix rates of pay, rules and working conditions. Needless to say, such a result compoletely undermines collective bargaining. Pursuant to express statutory provisions, interest arbitration in the railroads has always been voluntary. 45 U.S.C. 157, First. Arbitrators acting under the ICC's New York Dock Conditions lack the power to change or vitiate existing labor contracts.

Before and immediately after the formulation of the New York Dock Conditions, the ICC and arbitrators uniformly ruled that they lacked jurisdiction to alter the terms of collective bargaining agreements within the context of promulgating an implementing agreement to govern the effectuation of an ICC approved transaction. *NW/IT v. RYA/UTU*, NYD § 4 Arb. (Sickles, 1981); *NW/IT v. BLE/UTU*, NYD § 4 Arb. (Zumas, 1982); *NW/IT v. UTU*, NYD § 4 Arb. (Edwards, 1981); and *B&O v. BMWE*, NYD § 4 Arb. (Seidenberg, 1983). Any other outcome would render Section 2 of the New York Dock Conditions

meaningless. More particularly, the ICC never claimed authority to indefinitely supersede the Railway Labor Act far into the future merely because it, at one time, imposed employee protective conditions on a railroad. *Southern Railway Co. - Control - Central of Georgia Railway Co.*, 331 I.C.C. 151, 169-170 (1967); and *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). After the ICC's decision in the *DRGW* case, arbitrators overruled the prior line of decisions and held that they had authority to amend or nullify collective bargaining agreements and, in the extreme, to change representation. The issue is before the Supreme Court. At the specific request of the carrier-applicants in the *DRGW* case, the ICC expressly approved a trackage rights agreement containing crew assignment provisions at odds with existing collective bargaining agreements. In its brief to the Court, which is the ICC's latest pronouncement on its exemption authority, the ICC limited its claimed preemption over the Railway Labor Act. In footnote 17 on page 25 of its opening brief, the Commission wrote, "The Section 11341 (a) exemption applies, of course, to terms comprehended by the Commission's approval order." So, the ICC has now informed the Supreme Court that it seeks to supersede the Railway Labor Act only to the extent that it approved specific, future projects which the carrier-applicants presented to it during the course of the administrative proceeding. The transfer of work and workers from Waycross to Raceland was not placed before the ICC as part of the control application. On the contrary, the ICC, relying on the Carriers' representations, opined that the merger of the two holding companies would cause only short-lived employee displacements. 363 I.C.C. 521, 589. The ICC observed that, "It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." *Id.* Again, the Carriers led the ICC to believe that "perceptible dislocations" will be necessary only " . . . at points where the . . . end-to-end systems meet . . . " Waycross is approximately 600 miles

from Raceland and almost 500 miles from the nearest C&O point. Without doubt, the ICC did not foresee the Carriers' misguided attempt to coordinate work at two distant shops on two separately operated rail subsidiaries. The Carriers conveniently ignore the differences between the merger of two holding companies and the full scale merger of the subsidiaries. Since the subsidiaries are separate companies, the Carriers may only effect their proposed coordination pursuant to the terms of the Washington Job Protection Agreement. Inasmuch as the Carriers did not present the instant coordination to the ICC, jurisdiction accrues to this Committee only after the Carriers fully comply with the Railway Labor Act.

Similarly, this Committee may not entertain any changes in the Orange Book inasmuch as that merger protective agreement vests covered employees with lifetime employment on the former SCL property. Section 3 of the New York Dock Conditions absolutely preserves workers' rights and benefits under existing protective agreements. The ICC has never even hinted that its approval of a transaction abrogates prior employee protective contracts especially when those agreements, like the Orange Book, were negotiated in conjunction with the ICC's imposition of employee protection as a condition precedent to consummating an earlier merger. Since the ICC has never ruled that its orders prevail over the types of contracts listed in Section 3 of the New York Dock conditions, the Carriers cannot use Section 4 to compel the BRC to surrender Orange Book benefits.

Finally, the Organization may, at its discretion, negotiate implementing agreements which modify existing agreements. The Carriers cannot force the Organization to change the existing collective bargaining agreements in this case merely because, a few times in the past, the Organization voluntarily reached implementing agreements with the Carriers.

Raising an alternative jurisdictional consideration, the Organization avers that the Carriers' August 29, 1986 correspondence failed to satisfy the Section 4 notice requirements for two reasons. First, the notice was vague as to both employees and work. The notice failed to describe exactly what freight car heavy repair work was going to Raceland. Although the Carriers were creating 22 fewer positions at Raceland than they were eliminating at Waycross, they did not give any indication as to the status of the 22 employees who would be detrimentally affected by the transaction. Second, BRC's C&O General Chairman was skeptical of the Carriers' estimated need for 99 Raceland positions to perform the work moved from Waycross. Furthermore, he was particularly wary of the Carriers' intent to bring more employees into Raceland inasmuch as the C&O furloughed more than 200 Raceland Carmen on November 28, 1986. An improper Section 4 notice deprives this Committee of jurisdiction and the case must be dismissed. The Carriers must initiate the Section 4 process *de novo*, by tendering a new notice which fully and adequately describes their proposed changes including an accurate estimate of workers needed to perform the transferred work.

B. The Carriers' Position on Jurisdiction

At the onset, the Carriers underscore the rational business purpose of the coordination. Shippers' demand for conventional type freight cars is diminishing. They are opting for privately owned cars or intermodal equipment. While Raceland Shop is plagued with excess capacity, the Waycross facility lacks the space to assume repair work from Raceland unless CSX expends enormous sums to expand and renovate the plant. Since both shops will not be needed in the future, the Carriers chose to close the Waycross repair facility and transfer the work to Raceland.

During oral argument, the Organization conceded that the planned Waycross-Raceland coordination was a trans-

action within the ambit of the New York Dock Conditions. Admittedly, the Carriers did not specifically present the instant coordination to the ICC but all parties as well as the ICC realized that the railroads might engage in transactions other than those alluded to in their initial operating scheme long after the ICC's omnibus approval of the control application. The Commission remarked that it is "... possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. 521, 589 (1980). In his affidavit, the General Counsel of the Brotherhood of Maintenance of Way Employees realized that approval would eventually permit extensive future changes not needing ICC approval. The Commission responded to labor's concerns by imposing the New York Dock Conditions on each and every transaction. As the ICC found, the "... conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *Id.* Most importantly, the ICC concluded that the operation of a single system would permit the Carriers to reap operating and cost efficiencies including the alleviation of excess capacity at the C&O's Raceland facility. *Id.* at 538 and 561.

The Organization's position that this Committee lacks jurisdiction to formulate an implementing agreement covering the coordination of work between Waycross and Raceland is inconsistent with its past participation in consolidations which the Carriers undertook pursuant to the control case and in accord with arbitrated implementing agreements. See *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1984); *C&O v. BRC*, NYD § 4 Arb. (Marx, 1984); and *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1983). Jurisdiction was not an issue in any of these three prior Section 4 arbitrations manifesting the Organization's recognition that the sole purpose of Section 4 is to procure an implementing agreement covering the transaction.

The jurisdictional issue presented to this Committee is not a question of first impression. Many respected neutrals have ruled that, under Section 4 of the New York Dock Conditions, an arbitrator has the power to issue an implementing agreement governing a work transfer even though the transaction had not been anticipated during the ICC proceedings and implementation would override terms of existing collective bargaining agreements. *UP v. ATDA*, NYD § 4 Arb. (Fredenberger, 1984); *UP v. UTU*, NYD § 4 Arb. (Brown, 1985); *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985); and *UTU v. NW/SR*, NYD § 4 Arb. (Ables, 1985). In *UP v. ATDA*, *supra* at 12, Arbitrator Fredenberger relied on the *DRGW* case and concluded that " . . . the ICC . . . determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated." When it approved the CSX control application, the ICC necessarily authorized the transfer of work from one carrier to another as the inevitable consequence of implementing a transaction. If the Organization prevails, it would achieve its objective of thwarting all transactions. Such an outcome effectively cancels the ICC's approval in the control case. The Carriers would be precluded from ever obtaining the savings and benefits of operating a single rail system. In the *DRGW* case at page 5, the ICC emphasized that its " . . . approval exempts a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption . . . " from the Railway Labor Act. See also, *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F.2d 424 (8th Circ. 1963), cert. den., 375 U.S. 819 (1963). Continuing on the next page of its decision, the ICC squarely rejected the Organization's inference that its ruling conflicted with Section 2 of the New York Dock Conditions when it declared:

> "The terms of those conditions, however, must read in conjunction with our decision authorizing

> the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

The Organization employs wishful thinking when it asserts that the ICC subsequently modified its view of its own authority when the *DRGW* case reached the Supreme Court. The footnote which the Organization cites from the ICC's brief is attached to an unequivocal sentence reading: "The scope of the exemption is defined by the terms of the approved transaction." The ICC's brief provides little solace for the Organization. In its Reply Brief filed with the Court, the ICC vigorously asserted that provisions of the Railway Labor Act and collective bargaining contracts are automatically superseded to the extent necessary to carry out approved transactions. The ICC knew, as stated in its brief, that if the Carriers first had to endure the protracted negotiating procedures, with the right of economic self-help, contained in the Railway Labor Act, the transaction would be indefinitely delayed and most probably nullified. Thus, mandatory arbitration under Section 4 of the New York Dock Conditions insures that the parties will arrive, through either negotiation or arbitration, at an implementing agreement. Section 4 obviates the "... risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement these transactions ... " *Maine Central Railroad Co., Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Co. - Exemption From 49 U.S.C. 11342 and 11343*, I.C.C. Fin. Docket No. 30532 (August 22, 1985); appeal pending No. 85-1636 (D.C. Cir.).

All Carmen, who transfer from Waycross to Raceland, must be placed under the C&O Agreement to necessarily effectuate the coordination. And, the transaction cannot be consummated unless the Waycross freight car heavy repair work is shifted to the coordinated facility.

On December 30, 1980, the Organization entered into an implementing agreement providing for the transfer of SCL Carmen's work to the C&O. To reiterate, the Organization acknowledged that, as a consequence of accomplishing the transaction, Carmen may be removed from the SCL Agreement and placed under the C&O Agreement. In addition, the Carriers stress that they successfully negotiated implementing agreements covering this particular transaction with four of the six other labor unions representing affected Waycross employees. As to the two unions which have not signed implementing agreements, the unresolved issues are unrelated to the Carriers' right to transfer workers from Waycross to Raceland.

The Organization has the misplaced notion that the Carriers desire, through this Section 4 arbitration, to vitiate the Orange Book and schedule Agreements. After implementation, the SCL working Agreement and the Orange Book will remain viable and unaltered. Orange Book protected employees moving to Raceland will retain the full spectrum of benefits in the Orange Book.

In summary, this Committee has the jurisdiction to prepare an implementing agreement so that the Carriers may consolidate the work at Raceland. The exemption from the Railway Labor Act is coextensive with the ICC's approval in the control case.

With regard to the sufficiency of the Carriers' August 29, 1986 notice, the document disclosed exactly what changes were forthcoming and included an estimate of the number of employees, in each class, affected by the planned changes. The notice described the relevant Waycross work, noted the Waycross positions to be abolished

and the Raceland positions to be established, and informed the Organization of CSX's intent to close the Waycross facility. The plain, obvious fact was that the 22 employees (directly affected by the coordination) would be protected under the New York Dock Conditions. The notice contained sufficient details to permit the Organization to discuss the impending changes. None of the other labor organizations (which represent members affected by the transaction) challenged the adequacy of the notice. The Neutral Member of this Committee has previously ruled that the adequacy of Section 4 notices must be adjudged on a case by case basis. *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985). The notice in this case is even more specific and informative than the notice tendered in the above case and thus, it conformed to Section 4 of the New York Dock Conditions.

C. The Carriers' Position on the Contents of an Implementing Agreement

During negotiations, the Carriers offered the BRC more generous terms than the minimum level of benefits contained in the New York Dock Conditions. However, the Carriers' offer was conditioned on expeditiously consummating an agreement without resorting to arbitration. When negotiations reached impasse, the Carriers withdrew their offer and substituted the proposed October 15, 1986 implementing agreement. This Committee should disregard the Carriers' withdrawn proposals to encourage the Organization to reach negotiated settlements on future transactions. In addition, a Section 4 Arbitrator lacks the authority to write an implementing agreement which grants workers benefits greater than those specified in the New York Dock Conditions.

Immediately upon notification of the impending transaction, the Organization took the novel position that Orange Book protected workers could not be transferred to Raceland. Contrary to the Organization's bold assertion,

there is no language in the Orange Book prohibiting the Carriers from moving Orange Book protected employees to points beyond the boundaries of the former SCL property. Since 1966, none of the labor organizations which are parties to the Orange Book, including the BRC, have even suggested that the Carriers may only transfer Orange Book covered employees to other SCL locations. If any labor organization had taken such an untenable position, the issue would certainly have been adjudicated long ago. Orange Book Section 3(a) permitted the Carriers to transfer Orange Book employees throughout the former SCL system and concomitantly required the Organization to negotiate implementing agreements governing the force rearrangements. The Organization cannot, twenty years later, convert an affirmative right flowing to the SCL into a restriction on the Carriers' right to move Orange Book employees beyond the former SCL property.

By already signing implementing agreements, other labor organizations involved in this coordination recognize the Carriers' right to require Orange Book protected employees to transfer to Raceland with their work. Moreover, the current BRC General Chairman was not in office when the Orange Book was signed. His predecessor was privy to Orange Book negotiations. The former General Chairman implicitly acknowledged that Orange Book protected employees could be transferred to other than SCL points because he entered into implementing agreements providing for such transfers. The Seaboard System Railroad's former Executive President, who is also familiar with both negotiating and applying Orange Book provisions, confirmed that the parties never intended to grant Orange Book protected workers insulation from transfers to locations other than those on the former SCL property. The retired Executive Vice President further attested in Paragraph 12 of his December 8, 1986 affidavit:

> "12. From my familiarity with the negotiations leading to the agreement known as the Orange

> Book, there was a 'give and take' whereby certain working life income guarantees were granted by the merging railroads in exchange for the right of the merged carrier, SCL, to transfer work, consolidate facilities, and thereby transfer employees pursuant to implementing agreements to be negotiated thereunder."

The Orange Book was negotiated in an atmosphere replete with railroad mergers. The Orange Book drafters could easily foresee that there would be additional mergers necessitating SCL employees to relocate on the expanded property of a successor employer.

The parties have never accorded Orange Book covered employees the absolute right to remain on the SCL property. Pursuant to a December 30, 1980 implementing agreement, SCL Carmen, including Orange Book employees, transferred to the C&O. Six SCL Carmen, three of whom came under the Orange Book, shifted to the C&O and continued to enjoy Orange Book protection. In 1967, shortly after the Orange Book was signed, the Organization was a party to an implementing agreement providing for the transfer of SCL Carmen to the Richmond, Fredericksburg and Potomac Railroad. In 1973, the BRC along with other shop craft unions entered into an implementing agreement covering the coordination of SCL and Louisville & Nashville Railroad (L&N) shop facilities in Alabama. Other labor unions have also entered into implementing agreements requiring Orange Book protected workers to transfer off the SCL. Some Orange Book employees opted for a separation allowance per Orange Book Appendix G.

The Organization is again attempting to forever block the transaction by arguing that the transfer would place workers in a worse position, as specified in Orange Book Section 2(b), due to weather differences between Raceland ("harsh") and Waycross ("mild"). The contention is ludicrous. Greater weather variations can be expected vis-a-vis Miami, Florida and Richmond, Virginia yet, even the

Organization concedes that the Orange Book allows transfers between these two SCL points.

The Organization's proposed implementing agreement terms go far afield of the New York Dock Conditions and would render the transaction so expensive as to effectively prevent implementation. The Organization proposes that all Carmen may decline Raceland positions and, upon their voluntary furlough, still collect Orange Book benefits or New York Dock dismissal allowances. The Carrier would not only be burdened with paying expensive protection benefits but also would have to pay Raceland employees to perform Waycross work. The BRC General Chairman on the C&O seeks to automatically certify an unspecified number of Raceland employees even though dovetailing seniority does not constitute a *per se* adverse effect on junior Raceland Carmen. Whether or not any Raceland workers are eligible for New York Dock payments is best left to a Section 11 proceeding. In the control case, the ICC rejected labor's requests to prohibit residence changes and to enact a conclusive presumption as to adverse effect. 363 I.C.C. 589-590. Another Organization proposal might be inequitably construed to allow senior, furloughed Raceland Carmen to immediately displace junior workers who just followed their work from Raceland. Finally, the SCL General Chairman inappropriately urges utilization of furloughed Waycross Carmen ahead of Raceland employees. Not surprisingly, both the Carriers and the Organization's C&O General Chairman oppose this proposal.

On the other hand, the Carriers' proposed implementing agreement follows the New York Dock Conditions. Forced assignments at Raceland should be made in seniority order consistent with an employee's duty to exercise seniority over his work to the fullest extent. Once the transaction is implemented, there is no reason for the transferred workers to retain seniority at Waycross. The

Carriers request the Committee to adopt their October 15, 1986 proposed implementing agreement.

D. The Organization's Position on the Contents of an Implementing Agreement

The Orange Book clearly and unambiguously affords covered workers lifetime job protection on the SCL. The only exceptions are found in Orange Book Section 2(e). Section 3(a) permits work transfers on the ACL-SAL consolidated system but no further. Transferring Orange Book employees beyond the SCL property places them in a worse position with respect to their working conditions. See Orange Book Section 2(b). The intent and language of the Orange Book demonstrates that covered employees received guaranteed jobs on the former SCL property throughout their worklife. The Orange Book protection is shielded by Section 3 of the New York Dock Conditions and Orange Book protected employees have the right to elect Orange Book benefits as soon as they are affected by a New York Dock transaction. *SSR v. BRAC*, NYD § 4 Arb. (Zumas, 1983). Thus, they are entitled to opt for protective benefits and decline to transfer to Raceland.

The Carriers are unable to point to any Orange Book provision giving the Carriers the unilateral right to move Orange Book employees to the C&O property. On the contrary, Section 3(a) sets the limits of the Carriers' right. Moreover, the terminology regarding seniority in Section 2(e) refers to ". . . existing rules or agreements." Those rules, which are found in the agreements in effect at the time of the merger, provide for point seniority. For the same reasons, the classification of work rule in the January 1, 1968 schedule Agreement preserves the Waycross freight car heavy repair work to the Carmen's craft on the SCL. The Carriers' proposed implementing agreement would abrogate the Orange Book and the then existing working agreement.

At one time (in 1980), the Organization voluntarily entered into an implementing agreement allowing the Carriers to transfer SCL employees, including some Orange Book protected workers, from the SCL property at Richmond to a C&O facility in the same city. The Organization's voluntarism is not precedent for the wholesale removal of all Orange Book protected employees from the SCL. In contrast to the instant transaction, the Orange Book employees were not required to change their residence. The Carriers cannot compel the Organization to execute a similar implementing agreement under the guise of the New York Dock Conditions. The Organization's voluntary action was non-precedential. Although other labor organizations signed implementing agreements to govern this transaction, none (or at most one) of their members, who are involved in this transaction, enjoy Orange Book protection.

The Raceland weather is much more severe than at Waycross. Many of the Waycross Carmen work outdoors. Moving to a harsher working environment constitutes a change in working conditions which is prohibited by Section 2 of the New York Dock Conditions.

Besides provisions keeping Orange Book protected employees on the former SCL property and guaranteeing these workers an election of benefits at the time this transaction is effectuated, the implementing agreement should contain terms close to the implementing agreement originally proposed by the Carriers. The Carriers' October 15, 1986 proposal is grossly inferior to their prior offer. The Carriers are improperly penalizing the Organization for sincerely raising other issues, such as Orange Book interpretation, which directly impacted on the negotiations over an implementing agreement.

The BRC advocates the following changes to the Carriers' October 15, 1986 proposal. First, forced assignments to unfilled Raceland positions should be accomplished in

reverse seniority order. Since there will be fewer positions established at Raceland, it is more logical to start with junior affected employees allowing the senior workers, as opposed to junior workers, to remain in Waycross and draw protective benefits. Second, since the work being transferred to Waycross would have accrued to furloughed Waycross Carmen upon the retirement, resignation or death of active Waycross employees, the furloughed Waycross Carmen should have superior rights over Raceland employees to the transferred work. However, the BRC General Chairman on the C&O takes exception to this particular proposal. Third, workers who transfer should retain dual seniority at Raceland and Waycross. If a position (other than one of temporary duration) becomes vacant at Waycross, these workers will have a one time opportunity to return to Waycross and depending on their election, they will forfeit either their Raceland or Waycross seniority. Fourth, the Organization proposes the following language for inclusion in the implementing agreement:

> "When the transfers from Waycross to Raceland take place, a like number of the C&O employees at Raceland will be provided with *New York Dock* protective conditions starting with the oldest Raceland employee that falls below the youngest employee transferring in from Waycross; i.e., if 86 Waycross carmen are dovetailed into the Raceland seniority roster, then 86 Raceland carmen–starting with the oldest Raceland carmen in seniority–who falls below the youngest carmen in seniority from Waycross will be protected by the *New York Dock* protective conditions."

The C&O General Chairman asserted that Raceland has already absorbed several consolidations involving incoming workers over the last several years. While dovetailing is the fairest method of combining seniority rosters, each added coordination has detrimentally affected the relative seniority standing of Raceland Carmen. The constant influx of more senior workers cancels the benefits

derived from the accumulation of seniority. Subsequent to the transfer of work from Waycross, it becomes more likely that some presently employed Raceland Carmen will be furloughed. Protecting Raceland workers would give them more job security and compensate them for the loss of relative seniority. If the Carriers have correctly estimated that there will be sufficient work to occupy 99 additional Carmen, it should not object to protecting an equivalent number of Raceland Carmen because presumably the latter will continue in active employment.

VI. DISCUSSION

A. Jurisdiction

1. The Notice. The threshold issue before this Committee is whether the Carriers' August 29, 1986 notice conforms to the minimum requirements of Section 4 of the New York Dock Conditions. The pertinent portion of Section 4 provides: "Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Neutral Member of this Committee commented on the purpose and meaning of the above language in another Section 4 case, as follows:

> "The purpose of the advance notice is twofold: the notice triggers the Section 4 procedures which contain tight time deadlines for obtaining an implementing agreement; and, it informs the Organization (as well as all interested employees) of the impending, authorized New York Dock transaction so that the Organization and the Carriers may bargain, in good faith, over the terms of an implementing agreement. 360 I.C.C. 71. The notice must contain a full and adequate statement of the intended transaction and include an estimate of the number of affected workers. Since the ICC, in Article 1, Section 4(a) did not enumerate the essential elements of a New York Dock

> notice (aside from the adjectives "full and adequate" and the mandatory estimate), whether a particular notice conforms to Section 4(a) must be decided on a case by case basis." *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985).

Thus, the propriety of a Section 4 notice must be evaluated on a case by case basis taking into account the surrounding circumstances and peculiarities of each New York Dock transaction.

In this case, the notice satisfied Section 4. Since the Carriers intend to close the Waycross facility, all freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work. Also, the Carriers, in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining. The notice adequately apprised the Organization of the nature of the impending transaction because it easily ascertained that, from its perspective, the transaction would vitiate employee rights in the Orange Book and the SCL working Agreement.

2. Subject Matter Jurisdiction. In Section 1(a) of the New York Dock Conditions, the ICC broadly defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. The parties concur that the transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction. It is also undisputed that the intended consolidation was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application.

Where a transaction may cause the dismissal of displacement of workers, an implementing agreement:

> ". . . shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and *any assignment of employees made necessary by the transaction* shall be made on the basis of an agreement or decision under this section 4." [Emphasis added.] 360 I.C.C. 85.

While the ICC clearly authorized the Carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining rights, collective bargaining agreements and employee protection agreements. (See Sections 2 and 3 of the New York Dock Conditions.) When the Carriers' authorized transaction embraces components which could arguably conflict with the terms of one or more existing agreements, the issue becomes to what extent, if any, a New York Dock implementing agreement may properly preempt the existing agreements and the Railway Labor Act. The issue is an ongoing controversy in rail labor relations and is currently before the United States Supreme Court. Thus, any principles we espouse on this matter should be reevaluated based on the Supreme Court's decision in the *DRGW* case.

To resolve the issue in this case, we start by attempting to balance the competing policies of the Railway Labor Act and the ICC's New York Dock Conditions on the one side and the Interstate Commerce Act on the other side. The New York Dock Conditions were imposed on railroads for the exclusive benefit of any employee affected by a transaction. However, the Conditions were imposed as part of the ICC's overall regulatory scheme which is designed to encourage merged rail carriers to augment their ability to compete in the transportation marketplace by consolidating operations. Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus, there is not just

tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal statutes. Compare: *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen, supra* at 158-160, with *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co., supra.* The conflict has been carried forward into the New York Dock Conditions.

As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the *DRGW* case, the ICC decided that 49 U.S.C. 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction. According to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation. Subsequent to the ICC's ruling in the *DRGW* case, arbitrators who promulgated New York Dock implementing agreements pursuant to Section 4, have universally decided that implementation of a transaction prevails over conflicting terms in existing collective bargaining agreements. *ATDA v. UP*, NYD § 4 Arb. (Fredenberger, 1984); *UTU v. MP/UP*, NYD § 4 Arb. (Ables, 1985); and *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985). In an effort to distinguish those decisions, the Organization argues herein that the ICC recently tempered its perception of the outer limits of the Section 11341(a) exemption. Pointing to a footnote at page 25 of the ICC's Brief to the Supreme Court, the Organization submits that the ICC now asserts that the exemption applies ". . . only to terms comprehended by the Commission's approval order." The Organization concludes therefore, that the exemption is inapplicable to the Waycross-Raceland coordination. We disagree. The ICC's Opening and Reply Briefs do not include any definitive language demonstrating a modification of the ICC's

broad determination that its orders supersede the Railway Labor Act. Indeed, the footnote relied on by the Organization is appended to a statement asserting that the exemption mirrors the scope of the approved transaction. Elsewhere in its briefs, the ICC reiterates that the exemption goes beyond the transactions specifically mentioned in the approval proceeding so that railroads do not have to constantly return to the ICC to receive approval for each and every change made pursuant to the ICC's original order. At page 26, the ICC emphasized that the exemption arises automatically to cover "anything authorized or required" by an approval order. The last ICC pronouncement (more recent than the footnote cited by the Organization) is found at page 11 of its Reply Brief where the ICC declared:

> "The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction."

Although not expressed within the control application, the Raceland coordination is an approved transaction exempt from the Railway Labor Act.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between Section 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act. 49 U.S.C. 11341(a); 45 U.S.C. 156. If feasible, the trans-

action should reasonably accommodate existing collective bargaining agreements and collective bargainning rights.

Next, the Organization urges us to draw a delicate distinction between Section 2 and Section 3 of the New York Dock Conditions. Prior merger protection agreements might be more inviolable than existing collective bargaining agreements because the prior merger agreements, like the Orange Book, were formulated under the auspices of Section 5(2)(f) (now Section 11347) of the Interstate Commerce Act. If so, the Organization correctly argues that the ICC must expressly relieve the Carriers from Orange Book provisions when it engages in a New York Dock transaction pursuant to an approval order issued subsequent to the order approving the ACL-SAL merger. Given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts New York Dock transactions from conflicting terms in prior merger protective agreements. To our knowledge, the ICC has not addressed this dilemma. In the *DRGW* case, the ICC did not patently rule that the exemption abrogates prior employee protective agreements such as the Orange Book. We cannot speculate on exactly how the ICC would handle prior merger protection agreements. However, as we discussed above, the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation. Moreover, most rights and benefits preserved to employees under Section 3 of the New York Dock Conditions will be safeguarded through prudent applications of the reasonable accommodation standard.

Therefore, this Committee has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland.

B. The Contents of an Implementing Agreement

1. **The Orange Book.** Section 2(b) of the Orange Book provides that a covered employee will not be deprived of employment or placed in a worse position with regard

to his working conditions at any time during such employment with the SCL. In exchange for lifetime protection, the Carriers acquired the right to transfer work and workers throughout the merged (SAL-ACL) system. See Orange Book Section 3(a). To that end, Section 3(a) calls for the execution of mandatory implementing agreements. Without such a clause, the point seniority terms of the working agreement would have restricted the Carriers from moving employees. Since it was necessary for the SCL to obtain a provision allowing it to transfer Orange Book protected employees throughout the merged system, it logically follows that a similar term is essential to permit the Carriers to transfer Orange Book covered workers beyond the SCL property. Instead, the Carriers desire to translate a limited, affirmative right into the unfettered discretion to transfer Orange Book workers throughout any enlarged rail system. An affirmative right carries an inherent implication that the right is restricted to the express terms conferring the affirmative right. The affirmative right is capped. Under the Carriers' interpretation, the Section 3(a) language would be unnecessary since they ostensibly have the right to transfer Orange Book employees throughout the SCL, L&N, B&O and the C&O. The parties do not enter into solemnly negotiated agreements only to have the terms of their agreements rendered meaningless or superfluous. The ACL and SAL could have foreseen that they might later become the part of an even larger rail enterprise. Thus, drafters of the Orange Brook could have easily written terms providing for unrestricted transfers across any enlarged rail system.

Our decision that the Carriers may not transfer Orange Book protected employees beyond the former SCL property is premised on the clear and express language of Section 3(a). While a past practice may not vary or alter the clear and unambiguous Orange Book language, the Carriers' reference to prior implementing agreements was insufficient to raise a consistent and genuine past prac-

tice even if Section 3(a) was susceptible to differing interpretations. The prior implementing agreements involved a modicum of Orange Book covered workers and under some of the agreements, the Orange Book employees could receive separation pay, an option they probably chose. The December 30, 1980 implementing agreement resulted in the transfer of Orange Book covered employees form the SCL to the C&O but only within the same city. In any event, the Organization voluntarily entered into the implementing agreement. Although other labor organizations have signed implementing agreements with the Carriers governing this transaction, at most there was only one Orange Book employee involved. Thus, these implementing agreements provide us with little guidance in interpreting the Orange Book.

Even though Orange Book Section 3(a) provides that the work of Orange Book protected employees may be transferred throughout the SCL property (but no further), the provision must be subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland. Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions. Even under the Carriers' proposed implementing agreement, some of the Orange Book employees would have exercised their seniority to remaining positions at Waycross in lieu of transferring to Raceland. In summary, this Committee emphasizes that whether or not Section 3(a) can be reasonably accommodated with a New York Dock transaction must be analyzed on a case by case basis.

Enforcing the limit on transferring Orange Book protected employees might, under different facts, operate to completely bar the transaction. Then, the ICC's authorized transaction would be paramount to Orange Book Section 3(a). In this case, the Carriers may not compel Orange Book protected workers to accept Raceland positions.

This Committee realizes that its decision will create an anomaly. The more senior Orange Book workers will be able to obtain other positions at Waycross. The junior Orange Book protected workers, who will presumably decline Raceland positions will collect Orange Book benefits. However, the Carriers have other alternatives under the Orange Book.

Despite the terminology in Orange Book Section 3(a), the New York Dock implementing agreement covering this transaction shall provide, without restriction, for the transfer of all freight car heavy repair work from Waycross to Raceland. As soon as the Carriers commence the transaction, Orange Book protected employees who are affected by the transaction must elect either New York Dock benefits or Orange Book protection. *BRAC v. SSR*, NYD § 4 Arb. (Zumas, 1983).

2. **Other Issues.** For the reasons discussed earlier in our opinion, the work and employees transferred from Waycross shall be placed under the C&O schedule Agreement. Maintaining the work or employees under the SCL working agreement would for all practical purposes, block the transaction. A reasonable accommodation is impossible since the terms of the working agreement conflict with the implementation of the transaction.

Regardless of whether Raceland or Waycross has the more comfortable climate, the Carriers would be barred from effectuating any New York Dock transaction if workers could decline a transfer merely by asserting that the weather at their current point was more amenable than the meteorological conditions at the coordinated location.

Most importantly, the Organization is unable to cite any term in any existing agreement vesting Carmen with the right to perform work in a particular climate.

Most of the Organization's other proposals concern the inclusion of benefits more generous than the minimum level of benefits prescribed by the New York Dock Conditions. When fashioning an implementing agreement, a Section 4 arbitrator must adhere to the New York Dock Conditions. *BRC v. C&O/SSR (L&N)*, NYD § 4 Arb. (Marx, 1984). The parties are, of course, free to incorporate benefits above and beyond those in the New York Dock Conditions. In addition, the Carriers cannot be bound to their earlier offers containing benefits greater than those in the New York Dock Conditions. No party would offer a compromise if the party could later be held to the offer. Conditioning an agreement on acceptance of a package deal is a common tactic in labor negotiations. Thus, the Carriers could properly withdraw their October 10, 1986 proposed implementing agreement without prejudice to their position before this Committee.

The BRC's General Chairman on the C&O petitions us to automatically certify (for New York Dock protection) an equivalent number of junior Raceland Carmen corresponding to the number of workers transferring into Raceland. Section 1 of the Carriers' proposal provides blanket New York Dock coverage for all workers (at any location) who are affected by the instant transaction. The Carriers' proposal is simple and straightforward. In the control case, the ICC rejected labor's position that any adverse employment effect should be conclusively presumed to be merge related. 363 I.C.C. 521, 589. Whether any Raceland worker is affected by this transaction and eligible for New York Dock protection must be referred to a Section 11 arbitration committee. Waycross employees moving to Raceland shall be dovetailed into the appropriate roster under the C&O Agreement.

Section 4 of the New York Dock Conditions charges us with selecting forces on a basis appropriate for this transaction. The BRC proposes that Waycross Carmen, who transfer to Raceland, retain their Waycross seniority and have a one time right of first refusal to a permanent Waycross vacancy. The New York Dock Conditions contemplate an orderly and final adjustment of forces during implementation of the transaction. Maintenance of dual seniority defeats that objective. Finally, the parties should incorporate the Carriers' proposed preference tires for filling Raceland positions. [See Section 3(f) of the Carriers' October 15, 1986 proposal.]

Due to our finding that, under the unique facts of this case, the New York Dock Conditions prevent the Carrier from transferring Orange Book protected workers to Raceland, the Carrier must be given an opportunity to reevaluate the number of positions to be either abolished at Waycross or established at Raceland. If the Carrier adjusts the number of positions at either point, the amendment should be incorporated into the implementing agreement.

In summary, this Committee adopts the Carriers' proposed implementing agreement dated October 15, 1986 with the modifications specified in our Opinion. The parties agree that the effective date of this Award shall be March 23, 1987.

AWARD AND ORDER

This Committee renders the following Award and Order:

1. The Committee has jurisdiction over the subject matter of this dispute;

2. The parties shall adopt the Carriers' October 15, 1986 proposal as the Implementing Agreement governing the Waycross-Raceland Coordination with the following modifications:

   a. Adopt any adjustment in the number of positions to be either abolished at Waycross or established at Raceland; and,

   b. Adopt a provision relating to Orange Book protected workers which is consistent with this Opinion;

3. The Answer to the Organization's Issue No. 1 is "Yes";

4. The Answer to the Organization's Issue No. 2 is "No";

5. The Answer to the Organization's Issue No. 3 is "Yes";

6. The Answer to the Organization's Issue No. 4 is specified in (2) above;

7. The Answer to the Question at Issue presented by the BRC General Chairman on the C&O is "No."

Dated: March 23, 1987

/s/ R.P. WOJTOWICZ, Dissenting
R.P. Wojtowicz
Employees' Member

/s/ J.T. WILLIAMS.
Concurring in Part
And Dissenting in Part
J.T. Williams
Carriers' Member

/s/ JOHN B. LAROCCO
John B. LaRocco
Neutral Member

CARRIERS MEMBER'S CONCURRENCE AND DISSENT TO AWARD DATED MARCH 23, 1987, PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS AND SECTION 4 OF THE NOVEMBER 3, 1966 MERGER PROTECTIVE AGREEMENT

I concur with the Committee's Award and Order in paragraphs 1, 2, 2(a), 3, 5, 7, and that portion of paragraph 6 that incorporates paragraphs 2 and 2(a). I dissent from the Committee's Award and Order in paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b), for the reasons set forth below.

I. The Committee's Interpretation of the Orange Book Is Completely Without Foundation in the Arbitral Record or the Agreement and Exceeds Its Jurisdiction.

The Orange Book Agreement is a merger protective agreement entered into by Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company on November 3, 1966, in connection with the ICC-autorized merger which created the Seaboard Coast Line Railroad Company (SCL).* Pursuant to Section 4 of the Orange Book, this Committee was constituted in part to determine whether the Orange Book prohibited transfer of Orange Book-protected employees from a freight car heavy repair facility at Waycross, Georgia, formerly an SCL location, to Raceland, Kentucky, on The Chesapeake and Ohio Railway Company (C&O). The conclusion of this Committee that the Orange Book prohibits transfer of protected employees and their work off the SCL property is completely without foundation in the arbitral record or the Orange Book itself and exceeds the Committee's jurisdiction. There is absolutely no language in the Orange Book

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* As a result of subsequent mergers and name changes, CSX Transportation, Inc., is the current successor of SCL.

that supports such a conclusion and the action of the Committee is tantamount ot ignoring its express provisions and to rewriting the Agreement.

The Committee places total reliance for its conclusion on section 3(a) of the Agreement, which provides, in relevant part:

> (a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end.

This language does not even purport to prohibit the transfer of work and protected employees off the former SCL system. The Committee's assertion that section 3(a) clearly and unambiguously prohibits such transfers is completely outside any reasonable reading of that section. Indeed, clear and unambiguous language to that effect could have easily been written, had such a limitation been intended, i.e.: " The Merged Company is prohibited from transferring work and protected employees off the property of the Merged Company as it exists on the date of merger." The Orange Book contains nothing even remotely resembling such language.

Section 3(a) quite simply authorized the SCL to transfer work and employees throughout its merged or consolidated system as it then existed as a result of the authouized SAL-ACL merger. The Orange Book does not include a prohibition on transfers off the SCL property. If any such

prohibitions exist, they must be found in the applicable working agreement, not in the Orange Book. Indeed, the Committee acknowledges at p. 35 of the Award that the source of any such restriction is the "point seniority terms of the working agreement." Thus, the affirmative transfer rights provided by the Orange Book overrode the working agreement by permitting transfers throughout the merged system.

Orange Book protected employees were not intended to have greater protections against transfers than non-protected employees; indeed, one purpose of the Orange Book was to eliminate any restriction against transfers in exchange for the protective benefits granted in that agreement.

The Committee is totally in error when it states at page 35 of the Opinion that the Carriers are attempting "to translate a limited, affirmative right [to transfer Orange Book employees throughout the SCL] into an unfettered discretion to transfer Orange Book workers throughout any enlarged rail system." The Carriers never urged that the Orange Book was the source of its right to transfer Orange Book employees from Waycross to Raceland. The Carriers never served a notice under the Orange Book to accomplish the transfer to Raceland. The source of the Carriers' right in this transaction is the ICC authorization and the *New York Dock* Conditions. The Carriers served a *New York Dock* notice under the ICC's *CSX-Control* authorization to accomplish not only the transfer of *work*, but equally as important, the transfer of Orange Book *employees* to Raceland. Where the carrier obtains the authorization to transfer its employees off former SCL property from an independent source, such as the instant ICC order and the accompanying *New York Dock* conditions, nothing in the Orange Book prohibits the exercise of that authority with respect to Orange Book-protected employees.

Contrary to the Committee's understanding, the Carriers never stated that Section 3(a) of the Orange Book provided the affirmative right to transfer employees to Raceland. The Carriers correctly asserted that Section 3(a) *did not prohibit* transfers off the SCL. It neither authorized nor prohibited such transfers because the Orange Book looked only to the SCL merger. Absent any such prohibition, the Committee exceeded its authority by fashioning one out of whole cloth.

Furthermore, the Committee's discussion of the Orange Book in Section B.1. completely ignores Section 2(e) of the Orange Book, which expressly provides that Orange Book protection may be terminated in case of an employee's "failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements." This language is *not* limited to exercise of seniority rights on the SCL property. Rather, it requires the exercise of any seniority rights an Orange Book employee may have or may acquire under existing agreements at any point in time. Section 2(e) is full applicable to situations such as the present one where by virtue of an ICC-authorized *New York Dock* transaction, an Orange Book employee acquires seniority rights to a position available to him off the SCL property. In this case the Carriers, transaction results in Orange Book employees acquiring seniority rights to Raceland positions. The Committee's conclusion that an Orange Book employee can reject a position to which he has seniority rights and retain his Orange Book protection is flatly contrary to the express mandate of section 2(e) of the Orange Book. The Committee's Award effectively writes section 2(e) out of the Agreement.

The Committee's interpretation of the Orange Book is also contrary to all of the evidence submitted at the hearing. The Carmen submitted *absolutely no evidence* to support their claimed interpretation of the Orange Book.

Carriers, by contrast, submitted numerous implementing agreements with various crafts, including the Carmen, that explicitly provided that an Orange Book employee who declines a job off former SCL property *forfeits his Orange Book protection.* An Orange Book employee's only alternative to making a required relocation is to elect to resign in exchange for a lump sum separation allowance pursuant to Appendix G of the Orange Book.

These prior implementing agreements stand as unrefuted evidence of the parties' interpretation of the Orange Book. The first such agreement was entered into in 1967 and the Carmen were a party to it; more recently, such agreements were entered into less than two months prior to this arbitration hearing. The 1967 agreement is particularly compelling since it was entered into within one year of the Orange Book itself. These agreements establish that the parties have in fact applied the Orange Book precisely in accordance with the Carriers' position in this case: if an implementing agreement makes a position off the former SCL available to an Orange Book employee and that employee cannot otherwise hold an SCL position, the employee cannot decline the available position and retain his Orange Book protection.

The arbitral record contains no contrary evidence -- the Carmen could produce no implementing agreements which provided that Orange Book employees could decline positions off former SCL property and retain their Orange Book protection; nor could they cite even one instance where the Carriers attempted to transfer Orange Book employees off the SCL but were unable to do so because of any language in the Orange Book. Furthermore, the Carriers produced actual instances of approximately eighty Orange Book protected employees who were transferred off SCL property. The Carmen could not produce even one instance where an Orange Book-protected employee refused to transfer off former SCL property and retained

his protection. The implementing agreements unequivocally support Carriers' position that the Orange Book does not prohibit transfers off SCL property.

Carriers exhibited as part of their evidence in this case a prior New York Dock Section 4 arbitration award on this property in which the Neutral Member of this Committee (LaRocco) held:

> "Article I, Section 4 provides for the selection of forces which is most appropriate in each case. *The most reliable evidence for determining the appropriate method of allocating forces in this case is to look at how the parties resolved a similar issue in the past.*" (emphasis added)

In the case at hand, the Carriers submitted in evidence a dozen implementing agreements with the Carmen and other unions party to the Orange Book, all of which contemplated the transfer of Orange Book employees off the SCL to other railroads. Despite "looking" at these instances of how the parties interpreted the Orange Book in the past, this same Neutral Member (LaRocco) unaccountably chose to discount the implementing agreements as providing "us with little guidance in interpreting the Orange Book." Opinion at p. 36.

Of the dozen implementing agreements submitted in evidence by the Carriers, the Committee chose to discuss one – a 1980 agreement – which it noted involved transfers within the same city, but for reasons unexplained, ignored the several other agreements involving transfers between different cities. Although the Carriers' evidence clearly showed the actual names of more than eighty Orange Book employees who did transfer off the SCL to other railroads, the Committee described that number as a "modicum" and speculated without foundation that the Orange Book employees "probably" opted for a separation allowance in lieu of transferring. The Committee ignored the fact that separation allowances would have been available in the present transaction to those Orange

Book employees who prefer that option to transferring to Raceland.

The Committee at page 36 lays the erroneous foundation that the language of Section 3(a) is "clear and express" in prohibiting transfers of Orange Book employees off the SCL in order to discount the compelling evidence of past practice presented by the Carriers and to divert attention from the glaring lack of evidence presented by the Carmen. The Committee then characterizes the Carriers' evidence as "insufficient to raise a consistent and genuine past practice." An unbiased review of the record reveals a dozen implementing agreements which contemplated transfers of Orange Book employees off the SCL. The Carmen produced no implementing agreements at all. Thus, 100% of the evidence demonstrated a consistent and genuine past practice of twenty years' duration supporting the Carriers' position. There is absolutely no support in any of the agreements for existence of an Orange Book prohibition against transfers off SCL property.

The Committee also implicitly suggests that the organizations may have voluntarily waived Orange Book rights of their members. This suggestion is ludicrous. There is only one explanation why time after time over a twenty year period organizations acknowledged that Orange Book employees must accept positions off SCL property: they had no choice, because the Orange Book itself did not protect the employees against the required transfers.

The foregoing agreements and evidence flatly controvert the Committee's conclusion that an Orange Book employee may refuse to transfer off SCL property and still retain his Orange Book protection. They compel the finding that an Orange Book employee has no such right.

Finally, Carriers submitted an affidavit from C. E. Mervine, the retired Senior Vice President - Labor Relations who participated in the Orange Book negotiations, which was in complete harmony with the history of the

parties' actions as evidenced by the implementing agreements. For example, the affidavit states:

> 10. . . . I have particularly noted Mr. McAlpine's claims that the Orange Book insulates an employee protected under its terms from being required to transfer to locations other than those on the former Seaboard Coast Line property. Mr. McAlpine is in error, because from my knowledge of the Orange Book and its terms, and being very familiar with its intent, I can state that it grants no such right to employees protected thereunder; nor did the parties signatory to the Orange Book ever intend or contemplate that Orange Book protected employees would ever have or secure such rights.

The Carmen produced no contrary evidence from any union negotiators. The Committee simply ignored the affidavit, which makes clear that the Orange Book does not permit protected employees to refuse transfers off former SCL property and retain protection.

The Committee, acting in its capacity under Section 4 of the Orange Book Agreement, has exceeded its jurisdiction by reaching an interpretation of the Orange Book that disregards the express language of that Agreement as well as the unrebutted evidence in the record. The interpretation is wholly baseless and fails to draw its essence from the Orange Book or the record before the Committee; accordingly, I dissent.

II. The Committee Errs in Refusing to Supersede its Perceived Limitation on the Transfer of Orange Book-Protected Employees.

Separate from and independent of its erroneous conclusion discussed above, the Committee errs in refusing to carry out its obligation under the Interstate Commerce Act and Article I, Section 4 of the *New York Dock* Conditions to supersede those provisions of the Orange Book that the Committee finds limit Carriers' authority to

transfer Orange Book-protected employees from Waycross to Raceland.

In refusing to supersede this perceived contractual limitation, the Committee has erroneously applied the very I.C.C. decisions that it recognizes establish the proper standard under the Interstate Commerce Act and that it purports to follow. Those decisions establish that contractual and other legal limitations that "conflict with" a carrier's proposed implementation of an I.C.C.-approved "transaction" are, as a matter of law, superseded as a result of section 11341 (a) of the Interstate Commerce Act. Because a limitation on the transfer of Orange Book-protected employees clearly "conflicts with" the authorized transaction, as the Committee recognizes in its Opinion, the Committee should have approved the Carriers' proposed implementing agreement that would have required such employees to follow their available work from Waycross to Raceland.

At page 33 of its Opinion, the Committee correctly concludes that "the Raceland coordination is an approved transaction." Indeed, as the Committee accurately observed, the Carmen acknowledged the the "transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction." Opinion at 29-30. Thus, the proposed transfer of work is an "action taken pursuant to authorizations of [the Interstate Commerce] Commission" in *CSX-Control. New York Dock* Conditions, Article I, Section 1 (a).

The Committee also correctly recognizes at page 33 of its Opinion that, as an I.C.C.-approved transaction, the proposed transfer is "exempt from the Railway Labor Act" as a result of the provisions of section 11341 (a) of the I.C.A., which provides in relevant part that:

> "A carrier ... participating in that approved or exempted transaction is exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction ...."

Moreover, the Committee properly recognizes that, under Article I, Section 4 of the *New York Dock* Conditions, it serves as "a quasi-judicial extension of the ICC" and, as such, "must strictly follow the ICC's interpretation of its own authority." Opinion at 31. The Committee acknowledges that the I.C.C.'s definitive interpretation of its authority under the Interstate Commerce Act is contained in its *D.R.G.W.* decision.

The standard articulated by the I.C.C. in its *D.R.G.W.* decision is a clear one and is quoted by the Committee in its Opinion:

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added); Opinion at 17.

As the I.C.C. explained in its Supreme Court reply brief in *B.L.E.* v. *I.C.C.*:

> "Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not *conflict with* implementation of an approved transaction." Opinion at 33 (emphasis added).

Thus, the I.C.C. has definitively interpreted the I.C.A. and its own labor protective conditions as protecting existing collective bargaining agreements and existing working conditions only insofar as such agreements and conditions do not *conflict with* a carrier's proposed implementation of an I.C.C.-approved action such as the Waycross-Raceland consolidation. In the event of *any* such conflict, section 11341 (a) of the I.C.A. comes into play, and the conflicting limitation, regardless of its source, is superseded as a matter of law.

Notwithstanding its express recognition that it must "strictly follow" the I.C.C.'s interpretation and its quotation of the "conflict with" standard articulated by the Commission, the Committee errs at page 33 of its Opinion when

it creates the following additional condition for the supersession of the terms of existing collective bargaining agreements that conflict with the proposed implementation of a carrier action that has I.C.C. approval:

> "To the extent that terms of collective bargaining agreements and collective bargaining rights do not *thwart or substantially impede* the approved transaction, those agreements and rights are preserved. (Emphasis added.)

The Committee adopts this additional condition based on its erroneous determination that an "accommodation" is required between a proposed transaction and existing collective bargaining agreements and collective bargaining rights. Opinion at 33.

The Committee's stringent "thwart or substantially impede" condition is directly contrary to the "conflict with" standard articulated by the I.C.C. in *D.R.G.W.* Moreover, the Committee's conclusion that the I.C.C. has empowered it to engage in some sort of standardless balancing of the Carriers' right to implement the proposed transaction with the Carmen's asserted collective bargaining rights in order to achieve a "reasonable accommodation" is flatly inconsistent with the Commission's *D.R.G.W.* decision and its subsequent decision in *Maine Central.** The Committee's position improperly delegates unto itself the power to rewrite the transaction and make the business decision as to how the transaction should be structured.

In both *D.R.G.W.* and *Maine Central* the unions argued that existing collective bargaining agreements and working conditions could not be superseded because of the provisions in the Commission's labor protective conditions, such as those found in Article I, Sections 2 and 3 of the *New York Dock* Conditions, that preserve such agreements

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* *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry Co. – Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (1985).

and working conditions. The Commission flatly rejected this contention:

> "The labor conditions imposed under section 11347 preserve conditions and agreements *in the context of* the authorized transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).*

In rejecting labor's argument, the Commission did not provide that any sort of "reasonable accommodation" of the proposed transaction with such agreements was appropriate or permissible. Nor did the Commission state that only those collective bargaining agreements that would go so far as to "thwart or substantially impede" the approved carrier action are superseded. Indeed, the Commission directed that,

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements *must give way* to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).

Thus, the Commission has authoritatively interpreted I.C.A. Section 11341(a) and its own labor protection conditions as requiring the supersession of any terms of existing collective bargaining agreements that *conflict with* a proposed carrier implementation of an approved transaction. The carrier need not show that the proposed implementa-

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* The Commission rejected a similar argument in *Maine Central*:

> "For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisons to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions. *Maine Central*, slip op. at 7n. 11.

tion would be impossible or even extremely difficult absent freedom from contractual limitations. Such limitations "must give way," in the words of the I.C.C. in *D.R.G.W.*, whenever they "conflict with" the implementation of an approved transaction.

Had the Commission simply applied the "conflict with" standard as articulated by the I.C.C. in *D.R.G.W.*, it is apparent that it would have approved the Carrier's proposed implementing agreement and would have provided for the transfer of Orange Book-protected employees. The limitation on such a transfer that the Committee erroneously found in the Orange Book "conflicted with" Carriers' proposed implementation of the I.C.C.-approved transaction, since the transaction clearly included the transfer of Orange Book employees from Waycross to Raceland. The Orange Book prohibition that would restrict the Carriers from being able to transfer Orange Book employees with their work to Raceland clearly conflicts with the approved transaction.

The impact of the Committee's error in interpreting its own authority is severe. Carriers proposed to establish 86 carmen positions at Raceland. Of the 86 Waycross carmen who should be required to follow their work to Raceland, 57 have Orange Book protection. Under the Committee's award, these 57 Waycross employees can refuse to accept positions at Raceland, and continue to receive full pay despite the authorized transfer of their heavy repair work to Raceland. The Committee is in error when it claims at p. 37 of its Opinion that some of those employees could exercise seniority to remaining positions at Waycross. After the transfer of the work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority. The annual cost of carrying these 57 Orange Book employees on the payroll is *well in excess of $2 million.* In cavalier fashion, the Committee finds at page 37 that this burden "will only slightly impair the transaction." In fact, the Committee's conclusion presents a severe

conflict with implementation of the proposed coordination of repair work at Raceland.

As explained above, leaving in place the perceived limitation on the transfer of Orange Book employees will impose enormous costs on the Carriers that will substantially diminish, if not wholly consume, the economies and operating efficiencies associated with the proposed shop consolidation. Under any definition, such a limitation will "substantially impede" the authorized transaction, and cannot represent a "reasonable accommodation" of the transaction and the perceived Orange Book restriction. Thus, even if the additional condition applied by the Committee – that only those contractual limitations that would "thwart or substantially impede" an approved carrier action must "give way" – is a correct interpretation of the Interstate Commerce Act and the *New York Dock* Conditions, the Committee erred in its application of that additional condition in this case.

This nation's transportation policy has for decades been to foster and encourage the consolidation of rail carriers so as to obtain economies and efficiencies in furtherance of the public interest. Congress, through the Interstate Commerce Act, and the ICC have declared that legal and contractual impediments that conflict with the implementation of such consolidations must give way. The Committee's failure to follow the "conflict with" standard of the ICC and its refusal to supersede the perceived Orange Book limitation are flatly inconsistent with the underlying purpose of the Interstate Commerce Act and the ICC's consolidation approval in *CSX-Control*.

Accordingly, I dissent from paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b) of the Committee's Award and Order.

/s/ J. T. WILLIAMS
J. T. WILLIAMS
Carriers' Member

DISSENT OF EMPLOYEES' MEMBER

I dissent from the award and each material finding and conclusion contained in the Majority Opinion except that which affords the employees their Orange Book protection, however, I dissent from the Majority Opinion's reservations regarding even that protection.

The opinion and award in this case commit three egregious errors, all of which were called to the Neutral Member's attention and all of which were distainfully rejected or ignored.

With this decision we have almost reached the nadir in the application of what may now be ludicrously referred to as "employee protective" conditions. The Commission at one time agreed with the Congress and the courts that it could not inject itself into the area of labor relations except to the extent Congress permitted it to do so in protecting the monetary and contractual rights of employees affected by "actions taken pursuant to authorizations of the Commission." The Commission emphasized the protections it had designed as being "imposed upon railroads" for the "protection of employees".

The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations. However, no Commission ruling has gone so far to destroy the Railway Labor Act and collective bargaining agreement rights of employees as has the Neutral and Carriers' Members of this Committee in their decision in this case.

In every case in which the Commission has *held* it can supersede Railway Labor Act and collective bargaining agreement rights of employees by virtue of the existence of Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), it has done so based upon a claim that the specific carrier "action " had been presented to and 'approved" by the Commission in its approval of the financial transaction presented to it, e.g., a crew assignment provision in an ICC-approved trackage rights agreement.

The carrier "action" proposed here was never presented to or considered by the Commission. The Commission did not "approve" it. The only provisions in the Commission's orders affecting this case are contained in Sections 2 and 3 of the *New York Dock* conditions prohibiting interference with employee Railway Labor Act and collective bargaining agreement rights which sections the Majority Opinion herein considers ineffective.

The most basic and material error contained in the opinion, an error rendering invalid the entire proceeding, is factual and cannot be disputed. Section 4 of *New York Dock* requires a carrier to provide the representatives of their employees "a full and adequate statement of the changes to be effected." It cannot be reasonably disputed that the carriers' notice in this case did not satisfy that requirement. The BRC, as the employees' representative, had "heard" that some work in the Waycross shop was to be transferred to "some point" other than Raceland and sought to find out from the carrier the amount and identity of the work to be moved to Raceland but were rebuffed. [BRC-Div. of BRAC Submission, p. 20]

Following the hearing in the instant case, an injunction proceeding was brought in the U.S. District Court and during the course of a hearing before that Court it developed that the hopper car work which had been performed at Waycross for many years and constituted fully 50% of the "freight car heavy repair work" at Waycross was being transferred to Tampa. In a letter addressed to William G. Mahoney, Attorney for BRC Division of BRAC, and James D. Tomola, Attorney for CSX, the Neutral and Carriers' Members rejected BRC's request for the reopening of this proceeding in order to receive the new evidence developed before the federal court on the ground that "the work is a special covered hopper car program" (apparently the Carriers' Member so informed the Neutral Member after the hearing and the Neutral Member took him at his word) and because "the organization was aware before the arbitration hearing that this work was being transferred to

Tampa", referring to page 20 of BRC's Submission. But the statement on page 20 merely emphasizes the inadequacy of the carriers' notice. Certainly, there is no indication on that, or any other page of its Submission that BRC knew before the arbitration hearing that 50% of the freight car heavy repair work was being transferred to Tampa. (A copy of the letter rejecting the BRC's Motion to Reopen and a copy of the page 20 relied upon by the Neutral and Carriers' Members is appended to this dissent.)

The Notice of August 29, 1986 was inadequate and misleading, because it clearly indicated and led the BRC *and the Neutral* to believe that *all* freight car heavy repair work was being transferred from Waycross to Raceland at a time when fully one-half of it was being transferred to Tampa. Indeed, as noted below, the Majority Opinion relies heavily on this factual error. Therefore, the entire proceeding should have been ruled invalid, or at the very least, the proceeding should have been reopened to permit the issue of the Tampa work to have been fully developed. If that opportunity had been afforded BRC, it could have been demonstrated that the "work [was not] a special covered hopper car program" as found by the Neutral and the Carriers' Members in the letter of March 20, 1987, appended hereto, and that the work comprised at least 50% of the freight car heavy repair work being transferred.

The Majority Opinion confirms that it is based upon a substantial and substantive factual error, viz, that *all* freight car heavy repair work was being transferred to Raceland. At page 29, the Neutral and Carriers' Members find that the notice satisfied Section 4 and because "*all* freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work" in their Section 4 notice. Of course, one-half of the freight car repair work was being transferred to Tampa rendering the foregoing factual finding clearly in error.

At page 34 of the Majority Opinion, it is found that the arbitration committee "has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." No mention is made of the fact that one-half of that work has now been transferred to Tampa.

At page 37, in determining that it has the right to supersede the Railway Labor Act and collective bargaining agreement rights of the employees, the Majority of the Committee finds: "Otherwise the Carriers would be effectively thwarted from transferring *all* the Waycross freight car heavy repair work to Raceland." And, again at page 38, the Neutral and Carriers' Members of the Committee determined that the agreement they shall write and impose upon the employees "shall provide, without restriction, for the transfer of *all* freight car heavy repair work from Waycross to Raceland."

The repeated findings of fact that "all freight car heavy repair work" was going to be transferred from Waycross to Raceland is simply erroneous. The statement on page 20 of the Submission, appended hereto, as well as the notice and the findings of fact on "all " work dramatize the inadequacy of the notice and the basic unfairness demonstrated by the Neutral and Carriers' Members in this case in refusing to reopen this proceeding to review the facts which contradict the findings and by the Neutral Member's acceptance of an unsubstantiated statement that the "work is a special covered hopper car repair program."

The Majority of the Committee conclude at page 31 that "transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining." The decision then goes on to conclude that the two Acts are not to be accommodated to each other but that in every case where some efficiency is employed by a carrier following a control or merger approval by the ICC, and whether or not it was brought to the attention

of the ICC and whether or not the Interstate Commerce Act gave the ICC independent authority to approve it, the Railway Labor Act must give way to the railroad's desires.

The Interstate Commerce Act, of course, does *not* empower the ICC to approve or disapprove yard or shop consolidations. When operational changes, such as yard or shop consolidations, not under ICC jurisdiction, are presented to the ICC during the course of a merger or control proceeding, the ICC looks at them only insofar as they might render the transaction before it consistent or inconsistent with the public interest. The ICC has no independent statutory jurisdiction over such activity. The carriers do not require ICC authority prior to the consolidation of yards or shops whether such consolidations are intra- or inter-carrier. (Obviously, inter-carrier consolidations of shops would make little economic or operational sense unless the carriers involved were already under common control.)

If the ICC did not review a particular consolidation during a control or merger proceeding prior to approving the merger or control, it cannot thereafter approve or disapprove it under the Interstate Commerce Act. The carrier could not "constantly return to the ICC to receive approval" for each and every change made pursuant to the ICC's original order about which the Majority lavishes such concern at pages 32-33 of its opinion, simply because the I.C.C. does not have the statutory authority to approve such consolidations.

If the Interstate Commerce Act contains no ICC authority to approve a shop consolidation such as that described in the notice issued in this proceeding, then that Act cannot possibly be in conflict with the provisions of the Railway Labor Act much less prevail over the Railway Labor Act in an area which the Interstate Commerce Act does not even attempt to regulate.

The Majority Opinion is clear in its conclusion that all collective bargaining agreements, even pre-existing

employee protection agreements executed in earlier merger cases with the same carriers, are eliminated by the "ICC authorized transaction" if they "operate to completely bar the transaction". (Majority Opinion, page 37.)

The opinion, however, uses such vague, general and undefined terms as to render extinct the Railway Labor Act rights of employees in all cases.

At page 33, for example, the ICC is quoted as stating that the Section 11341(a) "exemption arises automatically to cover 'anything authorized or required' by the order. " The conclusion is then reached that "the Raceland coordination is an approved transaction exempt from the Railway Labor Act." Aside from the fact that the ICC has no statutory authority to approve the "Raceland coordination" after it has approved a transaction of which the coordination may be a result, the Majority Opinion concludes [page 33] that §11341(a) "is only triggered when necessary." The implication here, therefore, is clear that the "Raceland coordination" is "necessary" because the "Raceland coordination" is repeatedly referred to as an "approved" or "authorized transaction" [see pp. 33, 37].

The "Raceland coordination" was not approved during the course of the control case before the Commission because it was never presented to the ICC. The ICC could not now approve the "Raceland coordination" because it is not given jurisdiction over shop consolidations by the Interstate Commerce Act. Therefore, the implication plainly arises from the Majority Opinion that *any* action or activity that meets the definition of a "transaction" as found in Section 1(a) of *New York Dock* is immunized from the provisions of the Railway Labor Act and only "if feasible", whatever that may mean, "the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights" [pg. 33].

At pages 34-37, the Majority Opinion recognizes the transfer restrictions which Section 3(a) places upon the carriers [Majority Opinion, pg. 36] and acknowledges that

"given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts *New York Dock* transactions from conflicting terms in prior merger protective agreements" and that "the ICC has not addressed this dilemma" [pg. 34]. However, the Majority Opinion then dismisses the specific requirement of Section 3 of *New York Dock* which preserves to an employee "the rights or benefits . . . which such employee may have under any existing job security agreement", such as the Orange Book in this proceeding, and which expressly provides that employee an unlimited election "between the benefits under this appendix [*New York Dock*] and similar benefits under such other arrangement", with the statement that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation." [Pg. 34.]

The Majority Opinion then observes that "most rights and benefits preserved to employees under Section 3 of the New York Dock conditions will be safeguarded through prudent applications of the reasonable accommodation standard" [pg. 34] but, later concludes that the "ICC's authorized transaction would be paramount to Orange Book Section 3(a)" if it "would operate to completely bar the transaction" [pg. 37]. No indication is given of what might be considered a "complete bar to the transaction". Certainly, as applied by the Majority Opinion, the Orange Book could not bar the "Raceland coordination" even if all employees involved were covered by its provisions although such a coordination in those circumstances would cost the carrier more money. Apparently, the expenditure of money in the protection of the rights of the employees would constitute a "bar" to the transaction. This would seem to be a reasonable conclusion since prior to the "Raceland coordination" the Orange Book had never been a "bar" because exemptions have always been negotiated permitting transfers. Now apparently they are all to be arbitrated because of this purported "bar" found by the Majority.

Because of its misuse of terms; its vague use of terms; and, its conclusions in contradiction of the facts, this

Majority Opinion will be utilized by all carriers in future proceedings in attempts to strip the Railway Labor Act rights and collective bargaining agreement rights of every employee involved in a coordination since apparently any efficiency or convenience of operations made attractive by a merger or common control of a carrier can be carried out as if it had been "authorized and approved" in advance by the ICC even where the ICC has been given no statutory jurisdiction to approve or authorize that particular activity or even has been made aware such activity may ever occur.

For the foregoing reasons, the Employees' Member of the Arbitration Committee dissents from an unfair, inequitable, and flagrantly erroneous majority opinion and award in this proceeding.

/s/ R.P. WOJTOWICZ
R.P. WOJTOWICZ
Employees' Member

CARRIERS' MEMBERS' REPLY TO DISSENT OF EMPLOYEES' MEMBER

1. The Employees' Member in his Dissent claims that the Committee errs in finding the Carriers' notice to be adequate and in failing to grant the Carmen's motion to reopen the hearing based on alleged discovery of new evidence. The adequacy of notice issue is a red herring that simply reflects the Carmen's continuing efforts to block the transaction through any means possible, however remote.

The Employees' Member's Dissent is based on a manifest misreading of the Carriers' written notice of the transaction that was provided to the Carmen on August 29, 1986. That notice clearly indicated that on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed, and that all freight car heavy repair work and certain storeroom work then to be performed at Waycross would be transferred to Raceland, Kentucky. The notice indicated, by craft, the number of positions that the Carriers expected would be abolished at Waycross, and the number of positions that would be established at Raceland as a result of this transaction. The Carmen responded just four days later indicating that they would attempt to block the transaction and claiming, among other things, that the notice was inadequate.

The Employees' Member's Dissent misreads the notice and misrepresents the transaction by focusing on a particular covered hopper repair program that was to be performed at Tampa rather than at Waycross in 1987. Both the Neutral and the Carmen clearly understood that under the notice such work was not to be transferred to Raceland because the notice encompassed all work to be performed at Waycross at the expected time of implementation of the transaction in 1987. Indeed, the Carmen's prehearing Sub mission acknowledges at p. 20 that they were specifically informed during negotiations that the transfer to Raceland

included all heavy repair work otherwise to be performed at Waycross in 1987.

The Committee properly concluded at p. 29 that, since Waycross would be closed and all future Waycross heavy repair work would be transferred to Raceland, "the Carriers did not have to quantitatively or qualitatively describe the freight car repair work." More significantly, the Committee properly found that the notice requirement was met by the Carriers' good faith estimate of the number of employees that would be required to perform the quantum of work that would be transferred to Raceland. "Also the Carriers in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining." Opinion at 29.

The Employees' Member's Dissent at p. 4 erroneously suggestes that the Carmen and the Neutral were somehow misled and that a factural error underlies the Committee's Opinion. No factual error has been made. The transaction always contemplated, and the Carmen and the Neutral clearly understood, that all heavy repair work that would have been performed at Waycross in 1987 was to be transferred to Raceland.

As recognized by the Committee, the Carmen's immediate and adamant opposition to the transaction in its entirety exposes its claim of notice deficiencies as simple obstructionism; the Carmen knew immediately what the proposed transaction involved and decided to attempt to block the transaction in any way possible.

The Carmen continued their obstructionist tactics with a last minute request to reopen the arbitration hearing based on alleged discovery of new evidence – the alleged transfer of covered hopper repair work from Waycross to Tampa – at a court hearing on January 9, 1987. The Employees' Member's Dissent completely misrepresents the facts and the basis for denial of that motion.

Carriers responded to the Carmen's motion by letter (copy attached hereto) which showed that no new evidence was discovered on January 9 that would justify reopening the hearing. Specifically, Carriers' letter informed the Committee that BRC General Chairman McAlpine testified on January 9 that he was aware of the alleged transfer of repair work from Waycross to Tampa no later than September 10, 1986, more than three months prior to the arbitration. Further, Carriers explained that the subject of the 1987 Tampa covered hopper repair program was raised by the Carmen and fully explained by Carriers officials at an October 1, 1986 meeting, more than two months prior to the arbitration. Carriers' letter stated that at the October 1 meeting, "Carriers' officials clearly and unequivocally explained that a covered hopper repair program was being assigned to Tampa for 1987, that Carriers had the right to determine where this repair program would be performed, that it had been performed at Tampa in the recent past, and that this program was not part of the 1987 car repair work at Waycross which was being transferred to Raceland." The Carmen could not and did not deny these facts in response to Carriers' letter. To the contrary, General Chairmen McAlpine testified in court that Tampa had historically performed repair programs on the same type cars as Waycross and that the Carriers had the right to determine whether a particular car repair program would be assigned to Tampa or Waycross.

The Carmen's knowledge of the 1987 Tampa repair program and their arguments based on the transfer of work from Waycross to Tampa are reflected in the Carmen's initial Submission to the Committee at p. 20. Thus, the conclusion of the Committee in its March 23 letter that freight car repair work going to Tampa is not new evidence justifying a reconsideration of the adequacy of the Carriers' notice is entirely proper.

The Carmen had more than adequate opportunity to challenge the Carriers' notice at the December 18 hearing based on the 1987 Tampa hopper repair program, which

they admittedly were aware of no later than September 10, 1986. That program represents work that would not be performed at Waycross in 1987, regardless of any transfer of Waycross positions to Raceland. The Carmen's allegation that 50% of 1986 Waycross work was being transferred to Tampa was unsubstantiated and erroneous, did not represent new evidence, was irrelevant to the adequacy of Carriers' notice, and afforded no basis for reopening the arbitration hearing.

2. It is apparent from the Employees' Member's Dissent that his primary dispute in the remaining portions of his Dissent is with the decisions of the Interstate Commerce Commission that have ruled that the Railway Labor Act and provisios of private collective bargaining agreements must "give way" when they "conflict with" the proposed implementation of an approved carrier consolidation or merger. He states in his dissent at p. 1: "The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations." The Committee properly recognized, however, that as an arm of the I.C.C. performing functions delegated to it under Article I, Section 4 of the *New York Dock* Conditions, this Committee was bound to adhere strictly to the Commission's interpretation of the Interstate Commerce Act and *New York Dock*.

The Employees' Member goes further, however, and accuses the Committee of improperly expanding the Commission's decisions to include situations where the carrier action allegedly "was never presented to or considered by the Commission." This charge is based on both an inaccurate factual premise and on a fundamental misunderstanding of the authority conferred on these Carriers in *CSX – Control*.

First, as the Committee's decision notes, the Carmen acknowledged during the proceedings before the Committee that the proposed shop consolidation here was a "transaction" within the meaning of *New York Dock* and that

this carrier action was, accordingly, taken pursuant to the authority the Commission conferred on the Carriers to create a single, consolidated rail system in *CSX – Control.*

BRC's admission is conclusive in this case. Since the shop consolidation is a *New York Dock* transaction, it is a transaction authorized by the I.C.C.; *i.e.*, it is admittedly an "action taken pursuant to authorizations of this Commission in which these provisions have been imposed." As an authorized transaction, the shop consolidation is governed by the I.C.C. policy atriculated in *D.R.G.W.* and *Maine Central* whereby collective bargaining agreements and Railway Labor Act rights are superseded to the extent they conflict with the authorized transaction. In view of the Carmen's admission, the scope of the authority conferred by the Commission on the Carriers in *CAX – Control* and the legal consequences that flow therefrom, whether or not the shop consolidation was specifically presented to or considered by the I.C.C. is simply not relevant.

Second, although the precise consolidation of the Waycross and Raceland shops now proposed was not identified in the short-term operating plan presented to the Commission in *CSX – Control*, the record in the proceedings before the Commission was replete with references to the acknowledged fact that, following the grant of control authority, the Carriers would engage in such consolidations where deemed to be economic and cost-efficient. Indeed, as Carriers demonstrated at pp. 16-21 of their initial submission, representatives of rail labor repeatedly stressed to the Commission that such consolidations would occur. Thus, the fact that there would be future consolidations was indeed "presented to" the Commission.

Third, the Commission clearly "considered" such long-term consolidations and the effects on employees in its decision in *CSX – Control.* As set forth at pp. 22-23 of Carriers' submission, the Commission acknowledged that "additional coordinations may occur that could lead to further employee displacements" but concluded that its standard

labor protection condition "will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *CSX – Control*, 363 I.C.C. at 589.

Thus, in approving the establishment of a single, consolidated CSX rail system, the Commission clearly found that not only the immediate consolidation of facilities and coordination of operations described in Carriers' short-term operating plan but also the long-term implementation of "additional coordinations" was in the public interest. In granting control authority, the Commission found it to be in the public interest that the Carriers be managed with "fully coordinated or integrated facilities and operations." *Peoria & E.Ry. Co. Stockholders v. New York Central R.R. Co.*, 334 I.C.C. 131, 151 (1968).

The attempt by the Employees' Member to draw a line between those facility consolidation that are specifically referred to in the short-term operating plan (and that, accordingly, can be carried out notwithstanding the RLA and any limitations in existing collective bargaining agreements) and those that are encompassed within or are pursuant to the control authority but are proposed some time after the I.C.C. proceedings are completed (and that, according to the union, can be carried out only after obtaining the union's permission through the long, drawn-out negotiating processes of the RLA) is a specious one that has no basis in the terms of the I.C.A. or prior I.C.C. decisions and indeed is inconsistent with the Carmen's admission that the Waycross-Raceland consolidation constitutes a *New York Dock* transaction under *CSX – Control.*

/s/ J. T. WILLIAMS
J. T. Williams
Carriers' Member

RESPONSE TO DISSENT

The Neutral Member of this Committee has invited each partisan member of the Committee to respond to the dissent of the other partisan member. I believe such responses to be novel, inappropriate, if not improper, and to serve no constructive purpose. Consequently, I will not respond to the dissent filed herein by the Carriers' partisan member of this Committee.

/s/ R. P. WOJTOWICZ
R. P. Wojtowicz

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

BROTHERHOOD RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 Research Place
Rockville, MD 28050
(301) 948-4910

Plaintiff,

v.

CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FLA 32202
(904) 359-3100

Defendant.

Civil Action
No. CV 286-243

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This action has been brought by plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) against defentant CSX Transportation, Inc. (CSX) to protect plaintiff's and its members' rights under the Railway Labor Act, 45 U.S.C. § 151, *et seg.*, and to prohibit defendant from proceeding by arbitration to obtain changes in existing rates of pay, rules or working conditions over plaintiff's objections.

PARTIES, JURISDICITON AND VENUE

1. Plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC), is an unincorporated labor organization with its principal headquarters at 3 Research Place, Rockville, Maryland 28050, and is a representative of employees as those terms are defined in Sections 1 Fifth and Sixth of the Railway Labor Act, 45 U.S.C. §§ 151 Fifth and Sixth. Plaintiff BRAC is the duly designated representative of certain employees of defendant CSX and has established through negotiations with defendant CSX and its predecessor and constituent railroad companies various rates of pay, rules and working conditions which govern the employment of those employees. On August 6, 1986, the Brotherhood Railway Carmen of the United States and Canada merged into BRAC and became a semi-autonomous division of BRAC known as Brotherhood Railway Carmen-Division of BRAC (BRC). The BRC maintains its headquarters at 4929 Main Street, Kansas City, Missouri 64112. The National Mediation Board transferred the designation of the Brotherhood Railway Carmen as representative of the Carmen's craft or class of employees under the Railway Labor Act on defendant and other railroads throughout the United States and Canada to BRAC upon the merger of the unions. BRC retains the responsibility of representing such employees as division of BRAC.

2. Defendant CSX Transportation, Inc. (CSX) is a unit of CSX Corporation which is a holding company whose subsidiaries included The C&O Railway Company, The B&O Railroad Company, and Seaboard System Railroad, Inc., all of which are Class I railroad corporations subject to the jurisdiction of the Interstate Commerce Commission (ICC) and are carriers as that term is defined in Section 1 First of the Railway Labor Act, 45 U.S.C. § 151 First. CSX is responsible for the operations of the subsidiary railroads.

3. This court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337 (a) because the action arises under and seeks to enforce commands of the Railway Labor Act, an Act of Congress regulating interstate commerce. This Court has authority under 29 U.S.C. §§ 2201 and 2202 to issue the relief requested herein.

4. Venue is proper in this judicial district under 28 U.S.C. §1391(b) and (c) since the claim arose in this district and defendant CSX does business in this district through the Seaboard System Railroad (SSR).

COUNT I

5. On July 1, 1967, the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL) merged pursuant to the approval of the I.C.C. and become known as the Seaboard Coast Line Railroad Company (SCL).

6. In anticiaption of that merger, SAL, ACL and the labor organizations representing their employees, including the Brotherhood Railway Carmen, executed an agreement on November 3, 1966, for the protection of employees involved in that merger. That agreement because of its binding is commonly referred to as the Orange Book Agreement. A copy is attached as Exhibit A to this Complaint.

7. The Orange Book Agreement provides each employee covered thereby, with certain exceptions not here material, a guaranteed job for the remainder of his or her working life.

8. Consideration for this protection is found in Section 3(a) of that Agreement which provides in pertinent part:

> "(a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the [SAL-ACL] merged or consolidated system. . . ." [Exhibit A, § 3(a).]

In the absence of such a provision, such transfers of work would be in violation of Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh and of the applicable collective bargaining agreements.

9. On or about September 23, 1980, the I.C.C. in a proceeding designated Finance Docket 28905 (Sub. No. 1) and pursuant to Sections 11343-11345 and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11343-11345 and 11347, approved a petition of the CSX Corporation to acquire control of the railroad subsidiaries of the Seaboard Coast Line Industries, including SCL, and the Chessie System, Inc., including C&O, and merge those holding companies into CSX Corporation.

10. As a result of this I.C.C. approval, CSX Corporation obtained control of some 16 railroads, most of which formerly had been in competition with each other, including SCL and the C&O. This approval of control did not affect the obligations of SCL to its employees under the provisions of the Orange Book Agreement.

11. The I.C.C.'s opinion accompanying its approval, which is attached as Exhibit B hereto, noted that:

> "The subsidiary rail carriers will remain as separate corporate entities:
>
> "[T]raffic must still be interchanged among the affiliated carriers, ..."
>
> "Applicants propose a number of projects designed to coordinate operations at points where the two systems meet."
>
> "These [employee] dislocations, however, are said to be short-lived. It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." [Exhibit B, pp. 1 and 66.]

The projects referred to did not include the subject matter of this litigation, *i.e.*, the closing of the Waycross shop and transfer of work to Raceland, Kentucky.

12. Section 11347 of the Interstate Commerce Act, 49 U.S.C. §11347, provides in pertinent part that whenever the ICC approves a transaction under 49 U.S.C. §§11343, 11344, or 11345, such as the merger referred to in paragraph 9 hereof, the ICC "shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section [*i.e.*, §11347] before February 5, 1976, and the terms established under section 565 of title 45." The ICC has previously concluded that the employee protective provisions promulgated in *New York Dock Ry.–Control*, 360 I.C.C. 60, *aff'd. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), satisfy the minimum levels of protection required by 49 U.S.C. §11347. Those provisions are commonly referred to as the *New York Dock* conditions.

13. The I.C.C.'s approval of the CSX Corporation acquisitions was conditioned upon the railroads' application of the *New York Dock* conditions to each employee affected by the CSX Corporation's acquisition of control of the two holding companies. A copy of the *New York Dock* Conditions is attached as Exhibit C.

14. Article I, Section 4 of the *New York Dock* conditions provides as follows:

> (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected [sic] by such transaction,including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

15. Section 2 of the *New York Dock* conditions provides:

> The rates of pay, rules and working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

16. On or about August 29, 1986, CSX, purportedly pursuant to Article I, Section 4 of the *New York Dock* conditions imposed in Finance Docket 28905, served a notice upon the representatives of BRC, all other shop craft unions and BRAC, that the SCL freight car heavy repair shop in Waycross, Georgia would be shut down on or about December 31, 1986, and the freight car heavy repair work, along with certain store room work "will be transferred to the Chesapeake and Ohio Railway Company's freight car heavy repair shop at Raceland, Kentucky", more than 500 miles distant. The notice also indicated that the work would be removed from the SCL/BRC collective bargaining agreement and placed under the C&O/BRC collective bargaining agreement and that 149 jobs would be abolished at Waycross and 107 established at Raceland. This notice is attached as Exhibit D hereto.

17. On September 2, 1986, Lawrence W. McAlpine, Jr., as BRC General Chairman representing the interests of employees in the carman craft or class on SCL, wrote CSX stating that the content of the CSX notice of August 29, 1986, was improper and that, in addition, the proposed transfers were effectively barred by the Orange Book Agreement and the collective bargaining agreements governing rates of pay, rules and working conditions of BRC-represented employees. A copy of this letter is attached as Exhibit E.

18. A series of meetings and correspondence between Mr. McAlpine and CSX then followed which culminated

in Mr. McAlpine informing CSX by letter of November 4, 1986, that the proposed closing of the Waycross shop on the SCL and removal of that railroad's work to a C&O shop in Kentucky was not authorized by the I.C.C. in Finance Docket 28905 and therefore, the matter was not subject to the *New York Dock* conditions imposed in that proceeding. The correspondence is attached hereto as Exhibits F, G., H, and I, respectively. The November 4, 1986 letter is Exhibit I.

19. Article I, Section 4, where applicable, requires arbitration of disputes regarding implementing agreements. An arbitration hearing is set for December 18, 1986, in Jacksonville, Florida. CSX was requested to postpone arbitration until this Court has an opportunity to rule in this matter but has refused to do so.

20. The unilateral closing the SCL freight car heavy repair shop in Waycross, Georgia, and the transfer of the work involved to the C&O shop at Raceland, Kentucky, constitutes a unilateral change in the working conditions of the affected employees in violation of the prohibitions of Section 2 Seventh and Section 6 of the Railway Labor Act, 45 U.S.C. §§152 Seventh, 156, and defendant's attempt to compel arbitration to accomplish its goal violates the provisions of Section 7, quoted in full in paragraph 28 below. Neither is such action authorized by the Interstate Commerce Commission decision of September 23, 1980, approving the acquisitions set forth in paragraph 9 above.

21. The change in freight car heavy repair work contained in the CSX notice of August 29, 1986, cannot be implemented pursuant to the *New York Dock* conditions; and, the arbitration proceeding scheduled for December 18, 1986, pursuant to those conditions, has no legal basis under such conditions and the Interstate Commerce Commission order of September 23, 1980.

22. In violation of the agreements with the BRC, the above-referenced provisions of the Railway Labor Act and

the very provision of the *New York Dock* conditions under which CSX claims authority to make the subject transfer which provides in subsection 4(b) thereof that "no change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered", the defendant CSX for a period of at least three weeks has been engaged in dismantling the physical plant at the Waycross freight car heavy repair shop and moving the equipment therein away from that facility. See affidavit of Lawrence McAlpine attached hereto as Exhibit J.

COUNT II

23. All of the allegations of paragraphs 1 through 22 of this complaint are hereby incorporated and adopted in support of this Count II.

24. The collective bargaining agreement maintained by BRC with SCL provides that the work therein described shall belong to carmen employed by SCL. It is that work which CSX's notice would remove from the SCL railroad and the SCL/BRC agreement and place on the C&O railroad under the C&O/BRC agreement. The relevant provisions of the SCL/BRC agreement are attached hereto as Exhibit K.

25. The Orange Book Agreement provides its protections to approximately one-half of the BRC-represented employees who will be affected.

26. CSX would require employees covered by the Orange Book protections to leave their carrier-employer for employment with another railroad (C&O) not a party to the Orange Book Agreement.

27. The Orange Book Agreement, the collective bargaining agreements, the New York Dock Conditions, and the 1980 decision of the I.C.C. authorizing CSX control do not authorize or permit the changes in SCL rules and working conditions sought by CSX.

28. The Railway Labor Act in Section 7, First, 45 U.S.C. §157 First, expressly prohibits such changes to be compelled by arbitration:

> "Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall *not* be construed as a violation of *any* legal obligation imposed upon such party by the terms of this Act *or otherwise*." (Emphasis supplied.)

29. Section 2 Seventh of the Railway Labor Act, 45 U.S.C. §152 Seventh, provides that defendant CSX and its SCL and C&O subsidiaries may not "change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act".

30. Section 6 of the Railway Labor Act, 45 U.S.C. §156, provides that defendants CSX and its SCL and C&O subsidiaries:

> [S]hall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board has proffered its services, rates of pay, rules or working conditions

shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

31. Section 2 Seventh and Section 6 of the Railway Labor Act prohibit defendant CSX from implementing the transaction set forth in its notice of August 29, 1986. The transaction proposed by CSX involves a renegotiation of collective bargaining agreements which can be effected only through Sections 5, 6 and 10 of the Railway Labor Act, 45 U.S.C. §§155, 156, and 160. Effectuation of the proposed transaction can be accomplished only through the *voluntary* arbitration procedures of Section 7 First of the Railway Labor Act after the negotiation and mediation processes of the Act have failed to produce a voluntary agreement.

32. The proposed change in freight car heavy repair work as contained in the CSX notice of August 29, 1986, is in violation of the requirements of Sections 5, 6, 7, and 10 of the Railway Labor Act, 45 U.S.C. §§155, 156, 157, 160, and cannot be effectuated through the arbitration conducted under Article I, Section 4 of the *New York Dock* conditions scheduled for December 18, 1986, nor can the CSX rely upon the plenary power of the Interstate Commerce Commission under Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), to give it a right to compel arbitration in this case.

WHEREFORE, plaintiff BRC respectfully requests that this Court grant it the following relief:

A. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from changing rates of pay, rules or working conditions of SCL employees by removing work covered by the SCL/BRC agreement from the SCL and transferring it to the C&O unless the mandatory

provisions of Sections 5, 6 and 10 of that Act are first exhausted;

B. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from forcing its employees to accept employment with another railroad through the vehicle of compulsory arbitration on penalty of forfeiting economic protection;

C. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from changing the rates of pay, rules or working conditions of SCL employees as embodied in the Orange Book Agreement without following the procedures of the Railway Labor Act;

D. Issue a judgment declaring that defendant CSX by itself or through its SCL and C&O subsidiaries may not rely upon Article I, Section 4 of the *New York Dock* conditions to compel plaintiff BRAC to arbitrate changes to existing rates of pay, rules or working conditions as embodied in the SCL/BRC collective bargaining agreement and the Orange Book Agreement;

E. Issue an interlocutory and permanent injunction restraining defendant CSX, its officers, directors, agents, or anyone alse under its control or acting in its behalf, from applying or enforcing any arbitration award which may be issued in the arbitration presently scheduled for hearing on December 18, 1986, in Jacksonville, Florida, before arbitrator John B. LaRocco; and,

F. Grant plaintiff such other and further relief as this Court deems to be just and proper.

Respectfully submitted,

/s/ JOHN J. DELANEY
WILLIAM G. MAHONEY, ESQ.
JOHN O'B. CLARKE, JR., ESQ.
JOHN J. DELANEY, ESQ.

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Date: December 17, 1986